Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a lay-off, Petitioners made a prima facie case of age discrimination. Respondent's explanation for firing Petitioners was testimonial and subjective. Petitioners offered indirect evidence attacking the credibility of the explanation. The jury disbelieved Respondent and found for Petitioners. The Tenth Circuit reversed solely on the basis that Respondent's explanation was uncontroverted. Petitioners motion for new trial in lieu of judgment was denied without explanation.

The questions presented are:

1. Whether, as part of an emerging trend splitting the circuits, a special rule exists in employment discrimination cases wherein, as a matter of law, a jury is denied the right to disbelieve the testimony of an interested party and must accept an employer's proffered explanation unless there is direct evidence contradicting that explanation.

2. Whether the *McDonnell Douglas* indirect method of proof applies in a lay-off setting to require the employer to explain why certain groups of employees are included in the reduction while others are excluded; a matter as to which there is an acknowledged conflict between the decisions of the Circuits.

3. Whether jury verdicts in employment discrimination cases are entitled to the same deference afforded jury verdicts under FELA and the Jones Act, and whether summary reversal is proper in this case.

4. Whether denial of a post-JMOL motion for new trial by an appellate court is such a drastic measure that respect for the jury's function under the Seventh Amendment requires that such action be summarily reversed absent a statement of the basis for that denial.

LIST OF PARTIES

The Petitioners are Jack L. Doan, Robert S. Furr, Leslie Woosley and Bernard E. Ozinga. The caption identifies all of the Petitioners and the Respondent. All of the Petitioners were parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

Pursuant to Supreme Court Rule 12.4, *Doan v. Seagate Technology, Inc.*, 82 F.3d 974 (10th Cir. 1996) and *Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996) are joined because there are identical or substantial similar questions presented by the two cases.

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Petitioners Jack Doan, Robert S. Furr, Leslie Woosley and Bernard E. Ozinga respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review the May 1, 1996, Order and Judgment of the United States Court of Appeals for the Tenth Circuit. A timely petition for rehearing with suggestion for consideration in banc was filed. Rehearing was denied on July 15, 1996.

OPINIONS BELOW

The Orders and Judgments of the United States Court of Appeals for the Tenth Circuit for both appeals were entered on May 1, 1996, with the petition for rehearing denied on July 15, 1996. An application for clarification regarding Petitioners' motion for new trial in lieu of judgment was entered on August 12, 1996.

The Order denying all Petitioners' motions for new trial following appellate JMOL is reprinted as Appendix A. There is no official citation to such Order.

The Order jointly denying the Petition for Rehearing in both cases is reprinted as Appendix B. There is no official citation to such Order.

The Opinion of the Court in the *Doan* decision is reprinted as Appendix C. The official citation for the opinion in this case is: *Doan v. Seagate Technology, Inc.*, 82 F.3d 974 (10th Cir. 1996)

The Opinion of the Court in the *Furr* decision is reprinted as Appendix D. The official citation for the opinion in this case is: *Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996)

The Order of the District Court denying Petitioner's motion for judgment as a matter or law or alternative new trial in *Doan* filed April 15, 1995, is reprinted as Appendix E. There is no official citation for this Order.

The Judgment of the District Court in *Doan* entered October 5, 1994, is reprinted as Appendix F. There is no official citation for the judgment.

The Amended Judgment in *Furr* (April 17, 1995) is reprinted as Appendix G. There is no official citation.

The Judgment in *Furr* filed on April 12, 1995, is reprinted as Appendix H. There is no official citation.

The Order of the District Court denying Respondent's motion for new trial or JMOL in *Furr* entered April 10, 1995, is reprinted as Appendix I. There is no official citation for the Order.

The Order of the District Court assessing liquidated damages and prejudgment interest in *Furr* filed April 5, 1995, is reprinted as Appendix J. There is no official citation for this judgment.

The Special Verdict Form, Verdict for Woosley (in the *Furr* case) filed January 13, 1995, is reprinted as Appendix K. There is no official citation for this verdict.

The Special Verdict Form, Verdict for Furr (in the *Furr* case) filed January 13, 1995, is reprinted as Appendix L. There is no official citation for this verdict.

The Special Verdict Form, Verdict for Ozinga (in the *Furr* case) filed January 13, 1995, is reprinted as Appendix M. There is no official citation for this verdict.

STATEMENT OF JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 1, 1996. A Petition for Rehearing was timely filed and was denied on July 15, 1996. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order denying rehearing as provided by Supreme Court Rule 13.3. Jurisdiction is present under 28 U.S.C. § 1254(1).

A consolidated petition for review by certiorari is authorized by Supreme Court Rule 12.4 because the cases present questions which are either identical or closely related.

The original action filed in the United States District Court for the Western District of Oklahoma was brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* Jurisdiction in the district court existed under 29 U.S.C. § 626(c) and 28 U.S.C. § 1331. The judgment entered disposed of the entire action and was final and appealable pursuant to 28 U.S.C. § 1291. The appeal was perfected in accordance with Rule 4(a), Fed. R.App. Proc.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Seventh Amendment:

> In Suits as common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. § 623(a):

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Rule 50, Federal Rules of Civil Procedure:

(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot

under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial,

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

The Petitioners are Jack L. Doan, Robert S. Furr, Leslie Woosley and Bernard E. Ozinga. Mr. Doan in one trial and Furr, Woosley and Ozinga in another trial before separate juries demonstrated that they were laid off a part of a sham RIF and that the real reason for their selection was based on their age.

In addition to showing that they were terminated while younger employees were retained, the Petitioners offered evidence that (a) Respondent's claim of financial distress justifying the RIF was false, (b) hiring continued during the reduction even in job titles held by some of the Petitioners, (c) value rankings done in advance of the RIF showed Petitioners

to be more valuable to the affected groups than younger employees who were retained, (d) that of the employees subject to the RIF the older employees were much more frequently selected than younger employees, (e) the value rankings of managers themselves correlated to the age of the managers with youth being favored, (f) the RIF supposedly was to involve across-the-board reductions but certain groups of young employees had no one terminated and terminations came primarily from groups composed of older workers, (g) managers used subjective and undocumented criteria for the selections, (h) no-bumping rules were waived to preserve jobs for younger but not older employees, and (i) Petitioners were better objectively qualified than younger employees who were retained. These facts and where they appeared in the record were fully recited in Petitioners' Answers Brief to the Circuit.

Following the jury verdicts, the trial court denied Respondent's motions for JMOL or alternative new trial.

On appeal the Tenth Circuit reversed citing insufficient evidence. The Circuit Opinion omitted evidence which supported Petitioners' verdicts and also relied on arguments which had never been made at the trial court level. The Circuit denied Petitioners' prayer for new trial in lieu of judgment which were raised in the Petitions for Rehearing. A non-exclusive listing of the omitted evidence and newly advanced arguments was set out in Petitioners' Petitions for Rehearing.

REASONS FOR GRANTING THE WRIT

The reasons for granting certiorari to the Court of Appeals for the Tenth Circuit are as follows:

A. The Court of Appeals for the Tenth Circuit with the Seventh and Eleventh Circuits and in conflict with the Third

and Fifth Circuit, applied a legal principle for employment discrimination cases that juries may not disbelieve the employer's reasons for an action on the basis that the employer is an interested party unless that explanation is also contradicted by specific evidence. This position is in apparent conflict with this Court's decisions in *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

B. The Tenth Circuit used a restrictive version of *McDonnell Douglas* formulation applied only in RIF settings. The Tenth, Fifth and Eighth Circuits are in acknowledged conflict with the Third and Seventh Circuits as to whether, in a RIF, "additional evidence" of discriminatory intent is required to establish a prima facie case and as to how the burden of production is allocated.

C. The JMOL standard applied by the Tenth Circuit is in apparent conflict with the standard announced in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) as part of the Jones Act and FELA line of cases. The question of what JMOL standard applies to employment discrimination cases is an important issue which has not been, but should be, settled by this Court.

D. Entry of appellate JMOL followed by denial of a requested new trial in lieu of judgment is such a drastic measure that respect for the jury's function under the Seventh Amendment requires an express and on-the-record balancing of the reason for such denial. Failure to set-out reasons for such action should be deemed such a departure from accepted and usual judicial procedure that this Court should exercise superintending authority to summarily reverse such a failure.

Four questions are presented:

I.

WHETHER, AS PART OF AN EMERGING TREND SPLITTING THE CIRCUITS, A SPECIAL RULE EXISTS IN EMPLOYMENT DISCRIMINATION CASES WHEREIN, AS A MATTER OF LAW, A JURY IS DENIED THE RIGHT TO DISBELIEVE THE TESTIMONY OF AN INTERESTED PARTY AND MUST ACCEPT AN EMPLOYER'S PROFFERED EXPLANATION UNLESS THERE IS DIRECT EVIDENCE CONTRADICTING THAT EXPLANATION.

A conflict exists between the Tenth, Seventh and Eleventh Circuits and the Third and Fifth Circuits in applying the legal principle regarding a jury's right, in employment discrimination cases, to disbelieve uncontroverted testimony of an interested party.

The Tenth Circuit has joined the Seventh and Eleventh Circuit as viewing an employer's proffered explanation as uncontroverted absent specific evidence impeaching that explanation. The Third and Fifth Circuits hold that a jury is free to disbelieve the testimony of an interested party unless that testimony is capable of independent verification.

Certiorari is appropriate when, among the Circuits, there is "an apparent conflict in approach" to the resolution of important legal issues, *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) or when the approach of one Circuit "conflict[s], directly or in principle, with decisions of other Courts of Appeals". *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719 (1985).

The Seventh Circuit's statement in *Futrell v. J.I. Case*, 38 F.3d 342, 346 (7th Cir. 1994) is the clearest statement of the rule limiting the jury's authority:

> [W]e do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the exclusive right to judge credibility . . . If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate. . . .

(Internal citations omitted). *Also see Collier v. Budd Co.*, 66 F.3d 886, 893 (7th Cir. 1995) (credibility is an issue only "[i]f the employee offers *specific evidence*" to impeach the proffered reasons. Emphasis supplied).

The Eleventh Circuit in *Howard v. BP Oil Co., Inc.*, 32 F.3d 520 (11th Cir. 1994) agrees, holding that, unless internally inconsistent, statements of an interest party must be accepted and "mere denial of credibility has" no evidentiary value. *Id.*, 32 F.3d. at 526. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, __F.3d __ (11th Cir. 1996) 1996 WL 531799 *8 further required not only internal inconsistencies but a showing that the inconsistencies established that the explanation was pretextual.

In *Doan* and *Furr* the Tenth Circuit followed this approach in principle and characterized the employer's testimony as "uncontroverted", *id.*, 82 F.3d at 987-988, even when the testimony was used to explain away documents demonstrating that the value ranking of managers directly corresponded to the age of the manager, *Furr*, 82 F.3d at 988 ("uncontroverted testimony that age was not a factor in the rankings"), or to excuse deviation from the documented ranking of employees which deviation resulted in the firing of a Petitioner. *Doan*, 82 F.3d at 978 (manager's testimony as to why he deviated from written rankings of employees called "undisputed evidence").

Only by denying the jury its right to disbelieve the employer's explanation was the Tenth Circuit able to enter an appellate JMOL.

It should be noted that such rule has not been applied by the Tenth Circuit outside of the employment discrimination context. *See Madison v. Desert Livestock Co.*, 574 F.2d 1027, 1036-37 (10th Cir. 1978) and *Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980), *cert. denied*, 451 U.S. 984, *inter alia*.

Both the Third Circuit and the Fifth Circuit adhere to the principle that a jury's right to disbelieve oral testimony by the employer as an interested party is sufficient to sustain a finding of intentional discrimination. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir. 1992) (where "there is no supporting documentation, a jury can reasonably infer pretext") and *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1465 (5th Cir. 1989) ("where the only evidence of intent is oral testimony, a jury could always choose to discredit it.") (quoting *Byaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). In addition to *Byaya see Fuentes v. Perskie*, 32 F.3d 759, 764 n. 7 (3d Cir. 1994) (rejecting some reasons can justify rejecting "the remaining proffered reasons, even if no evidence undermining those remaining rationales . . . is available.")

In employment discrimination cases a jury's ability to reject an employer's explanation solely due to the employer's status as an interested party is a matter which is potentially dispositive of many cases. This principle directly interacts with the rule announced in *Hicks*, 509 U.S. at 511 that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination."

Determining the correct principle is equal in both frequency and importance to the question of whether direct evidence was required to prove discriminatory intent decided by this Court in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3, 717 (1983). Resolution of this principle vindicates "[t]he prohibitions against discrimination [which] reflect an important national policy." *Id.*, 460 U.S. at 716. Thus, this question meets the test of being "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Moreover, the approach used by the Tenth, Seventh and Eleventh Circuits is wrong. "[T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899). *Also Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891) and *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Exceptions to this rule have been limited to cases where the testimony "from no reasonable point of view is . . . open to doubt", *Chesapeake & O.R. Co. v. Martin*, 283 U.S. 209, 216 (1931), such as when testimony goes to verifiable facts that the testimony "if inaccurate, readily could [be] shown to be so." *Id.* Testimony by an interested party as to mental processes and intent should never be considered the kind of uncontroverted testimony which can warrant JMOL. *Cf., Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) ("subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury").

No different rule should apply for employment discrimination. *Aikens*, 460 U.S. at 716 specifically stated that:

> . . . There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial

> courts or reviewing courts should treat discrimination cases differently from other ultimate questions of fact . . . .

(Quoted with approval in *Hicks*, 509 U.S. at 524). Further, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1973) the Court stated that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."

An "apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding" in *Aikens* and *Burdine* exists and is a proper basis for granting certiorari. *United States v. Doe*, 465 U.S. 605, 610 (1984).

II.

WHETHER THE McDONNELL DOUGLAS INDIRECT METHOD OF PROOF APPLIES IN A LAY-OFF SETTING TO REQUIRE THE EMPLOYER TO EXPLAIN WHY CERTAIN GROUPS OF EMPLOYEES ARE INCLUDED IN THE REDUCTION WHILE OTHERS ARE EXCLUDED; A MATTER AS TO WHICH THERE IS AN ACKNOWLEDGED CONFLICT BETWEEN THE DECISIONS OF THE CIRCUITS.

The Circuits have explicitly recognized that their decisions conflict regarding proper formulation of the prima facie case and burden of production in a RIF setting. *See Marzano v. Computer Science Corp. Inc.*, 91 F.3d 497, 507, 510 (3d Cir. 1996) ("We reject the 'additional evidence' requirement" set out by Eighth Circuit in *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 763 (8th Cir.1995). Similarly, the Seventh Circuit in *Oxman v. WLS-TV*, 846 F.2d 448, 452, 455-56 (7th Cir. 1988)

expressly rejected the Fifth Circuit's approach from *Williams v. General Motors Corp.*, 656 F.2d 120, 128 (5th Cir.1981), *cert. denied,* 455 U.S. 943. The conflict among the Circuits is so complex and pervasive that it occupies two chapters in 2 Howard C. Eglit *Age Discrimination* §§ 7.22, 7.23 (2d Ed). The conflict on this issue goes to the fundamental analysis of how discrimination may be proved in a RIF setting. The result of this conflict is that a plaintiff's chance of success may depend as much on the circuit hearing the case as on the facts. As RIFs become increasingly pervasive, the need for a definitive pronouncement from this Court becomes ever more urgent.

In following the "additional evidence" approach, the Tenth Circuit required Petitioners to eliminate all possible legitimate reasons for the selection process even though the employer had not itself articulated an explanation. "Plaintiffs have not produced any evidence indicating that the unaffected departments were similarly situated or performed identical functions to the affected departments." *Furr,* 82 F.3d at 987. The Circuit speculated that "the fact that some departments were unaffected *may* be the natural consequence of the greater perceived importance of certain departments." *Id.*, emphasis supplied.

In contrast, the Third and Seventh Circuits require the employer to explain why certain employees are made subject to a RIF while other employees are not. "[A]n employer that releases a protected employee while [retaining] younger employees [must] explain its actions without forcing the protected employee to uncover the elusive 'smoking gun.' " *Oxman,* 846 F.2d at 455-56. *Accord Marzano,* 91 F.3d at 508-511 (3d Cir.).

Although the presumption created by the prima facie case drops out of the picture at trial, the factual elements making up

the prima facie case continue to be important to the ultimate outcome. Absent a sufficient explanation by the employer, a jury which "finds that the prima facie case *is* supported by a preponderance of the evidence . . . *must,* therefore, render a verdict for the plaintiff." *Hicks,* 509 U.S. at 510 n. 3, emphasis by the Court. The sufficiency of employer's proffer is tested by whether it addresses the facts making up the prima facie case. *Teamsters v. United States,* 431 U.S. 324, 361 n. 46 (1977). Finally, the facts making up the prima facie case coupled with "disbelief of the reasons put forward by the defendant [may] suffice to show intentional discrimination." *Hicks,* 509 U.S. at 511.

Thus, whether plaintiff's evidence suffices to sustain a verdict necessarily begins with an assessment of what facts are sufficient to establish a prima facie case and what explanation must be produced by the employer in response to such facts.

Here, failure to explain exclusion of groups of young employees in what was described as an across-the-board RIF, should have equated to a failure to answer the elements of the prima facie case and warranted judgment for Petitioners. Only by shifting the burden of explanation away from the employer, was the Circuit able to deny Petitioners' the benefit of the usual inference from this evidence.

III.

WHETHER JURY VERDICTS IN EMPLOYMENT DISCRIMINATION CASES ARE ENTITLED TO THE SAME DEFERENCE AFFORDED JURY VERDICTS UNDER FELA AND THE JONES ACT, AND WHETHER SUMMARY REVERSAL IS PROPER IN THIS CASE.

In *Lavender v. Kurn,* 327 U.S. 645, 653 (1946) this Court

held that judgment as a matter of law was appropriate in FELA cases "only when there is a complete absence of probative facts to support the conclusion reached" by the jury. The question of whether this standard is limited to FELA/Jones Act cases or applies more broadly is a principle as to which the Circuits are split. 9A Wright & Miller, *Federal Civil Procedure, Civil 2d:* § 2526, pp. 279 and n. 15 at 279-80 and listing the Tenth Circuit as one of the Circuits limiting this rule to FELA cases. "A decision by the Supreme Court clearly stating which view it takes as to the scope of the FELA and Jones Act decisions would be of helpful guidance to the lower federal courts." *Id.*, at 282.

At the least, the same deference given FELA jury verdicts should apply in employment discrimination settings, because whether there was an intent to discriminate "is a pure question of fact [and] not a question of law and not a mixed question of law and fact." *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88 (1982). There will rarely be impartial eyewitnesses and proof will come from inferences from circumstantial evidence. *Aikens,* 460 U.S. at 714 n. 3, 717. Simply put, the jury must decide "which party's explanation of the employer's motivation it believes." *Id.*, 460 U.S. at 716. Furthermore, Congress authorized jury trials expressly because a "jury may be more neutral" and "more likely to be open to the issues raised by the plaintiffs than a judge." 123 Cong. Rec. 34318 (1977) (comments of Sen. Kennedy).

Frankly, Petitioners believe that under any standard JMOL was improper and that a cursory review of the factual statements in the Petitioners' appellate briefs and Petitions for Rehearing would warrant the summary reversal procedural which this Court has referred to in FELA and even non-FELA cases. *See Harris v. Pennsylvania R. Co.,* 355 U.S. 424, 20 (1958) compiling FELA cases.

IV.

WHETHER DENIAL OF A POST-JMOL MOTION FOR NEW TRIAL BY AN APPELLATE COURT IS SUCH A DRASTIC MEASURE THAT RESPECT FOR THE JURY'S FUNCTION UNDER THE SEVENTH AMENDMENT REQUIRES THAT SUCH ACTION BE SUMMARILY REVERSED ABSENT A STATEMENT OF THE BASIS FOR THAT DENIAL.

The decision to render JMOL on appeal is a drastic remedy, but also one that is being used with increasing frequency. In addition to the two Petitioners' cases, *see Ontiveros v. Asarco, Inc.*, 83 F.3d 732, 734 (5th Cir. 1996) and *Isenbergh, supra*, __ F.3d __ (11th Cir. 1996) 1996 WL 531799. It is essential that guidelines be clearly set both for deciding JMOL and for post-JMOL motions for new trial in lieu of judgment.

As this Court cautioned in *Neely v. Eby Construction Co.*, 386 U.S. 317, 327 (1967) when appellate JMOL is based on perceived insufficiency of the evidence "it is not so clear that the litigation should be terminated." It is not completely clear that JMOL on this basis is permissible under the Seventh Amendment. "Because the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-40 (1979) (Rehnquist, J, separate opinion). "In the early days of the common law, the remedy for a jury finding contrary to the evidence was to grant a new trial." *Boeing Co. v. Shipman*, 411 F.2d 385, 390 (5th Cir. 1969). Accord Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 311-317 (1966).

At the least, the drastic nature of JMOL mandates

consideration of the alternative entry of new trial even when that was not independently raised. *Neely*, 386 U.S. at 329-330. Consideration of the alternative new trial was a "duty" of the Court and, even though not raised by the parties, "it would have been better had [the Court of Appeals'] opinion expressly dealt with the new trial question." *Id.*

Here, Petitioners expressly requested a new trial in their Petitions for Rehearing but the Tenth Circuit without explanation denied such request. The logical extension of *Neely* is that such failure is an abuse of discrimination warranting summary reversal. The procedure outlined in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-102 (1981) (control of class action litigation) should apply equally to motions for new trial following appellate JMOL:

> [The Order] should be based on a clear record and specific findings that reflect a weighing of the need for a limitation... Only such a determination can ensure that the court is furthering, rather than hindering the policies embodied in the Federal Rules of Civil Procedure... In addition, such a weighing — identifying the potential abuses being addressed — should result in a carefully drawn order....

As in *Gulf Oil, id.*, "one looks in vain for any indication of a careful weighing of competing factors" and the absence of such indication should warrant summary reversal.

CONCLUSION

Petitioners pray that this Court grant Certiorari to the Tenth Circuit of the United States Court of Appeals and either determine the important issues presented in this Petition or summarily reverse the Tenth Circuit's Opinions.

Respectfully submitted,

MARK EDGAR HAMMONS
Counsel of Record
Attorney for Petitioners
401 North Hudson, Lower Level
Oklahoma City, Oklahoma 73102
(405) 235-6100

Dated: October, 15, 1996.

APPENDIX A — ORDER ON REQUEST FOR CLARIFICATION OF ORDER DENYING PETITION FOR REHEARING AND DENYING APPELLANT'S ALTERNATIVE RULE 50(d) MOTION FILED AUGUST 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-6180

JACK L. DOAN, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant-Appellant.

No. 95-6181

ROBERT S. FURR, LESLIE WOOSLEY, BERNARD E. OZINGA,

Plaintiffs-Appellees,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant-Appellant.

ORDER
Filed August 12, 1996

Appendix A

Before BALDOCK, McWILLIAMS, and KELLY, Circuit Judges.

The court has for consideration appellees' Application for Clarification of Order Denying Rehearing Regarding the Alternative Rule 50(d) Motion and Costs, and appellant's response.

Upon consideration whereof, the application is denied. The orders denying rehearing denied all requested relief.

Entered for the Court

PATRICK FISHER, Clerk

s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX B — ORDER DENYING PETITION FOR REHEARING ENTERED JULY 15, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-6180
D.C. # CIV-93-1210-R

JACK L. DOAN, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant-Appellant.

No. 95-6181
D.C. # CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY, BERNARD E. OZINGA,

Plaintiffs-Appellees,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant-Appellant.

ORDER
Entered July 15, 1996

Appendix B

Before BALDOCK, McWILLIAMS, and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: s/ Denise M. Cordova
Denise M. Cordova
Deputy Clerk

APPENDIX C — OPINION OF THE COURT IN *DOAN V. SEAGATE TECHNOLOGY, INC.* DATED MAY 1, 1996

Jack L. DOAN, on Behalf of Himself
and Others Similarly Situated,
Plaintiff-Appellee,

v.

SEAGATE TECHNOLOGY, INC.,
Defendant-Appellant.

No. 95-6180.

United States Court of Appeals,
Tenth Circuit.

May 1, 1996.

* * *

Appeal from the United States District Court for the Western District of Oklahoma; David L. Russell, Judge (D.C. No. CIV-93-1210-R).

Gary C. Pierson (Tony G. Puckett and Rochelle L. Huddleston, with him on the brief), of Lytle Soulé & Curlee, Oklahoma City, Oklahoma, for Defendant-Appellant.

Mark Hammons of Hammons & Associates, Oklahoma City, Oklahoma for Plaintiff-Appellee.

Before BALDOCK, McWILLIAMS and KELLY, Circuit Judge.

Appendix C

PAUL KELLY, Jr., Circuit Judge.

Plaintiff-Appellee Jack L. Doan alleges that his employment with Defendant-Appellant Seagate Technology, Inc. was terminated because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, and Oklahoma public policy.[1] The case was tried to a jury, which returned a verdict in favor of the Plaintiff. Seagate filed a motion for judgment as a matter of law or a new trial, which was denied by the district court. This appeal followed.

I. Background

Seagate designs, manufacturers and markets hard disk drives for computer systems. It has plants in 17 countries and over 30,000 employees worldwide. Seagate commenced operations in Oklahoma City on October 1, 1989, after purchasing an existing facility from another disk drive company. The Oklahoma City plant employed approximately 2,000 people.

In June 1991, Seagate's senior management determined that certain cost-containment measures would have to be taken to address an anticipated decline in profit margins. These measures included a company-wide reduction-in-force ("RIF"). The RIF was not undertaken as a desperate measure, but rather as a strategic business decision aimed at improving

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1. Plaintiff concedes that the intervening case of *List v. Anchor Paint Manufacturing Co.*, 910 P.2d 1011 (Okla. 1996), disallows his state law claim. In *List*, the Oklahoma Supreme Court held that Oklahoma does not recognize a wrongful discharge claim predicated on Oklahoma public policy where the plaintiff has statutory cause of action. *Id.* at 1013.

the company's position in the highly competitive hard disk drive market.

The initial RIF occurred in July 1991, with a second, smaller RIF in August 1991. Approximately 1,200 employees were laid off from Seagate nationwide, including fifty-four from Oklahoma City.

Mr. Doan was employed by Seagate at its Oklahoma City plant. Although he did not possess an engineering degree, his job title was Manufacturing Engineer. He was, however, primarily responsible for coordinating the shipment of products and computer test equipment to Seagate's facility in Singapore. Mr. Doan's immediate supervisor was David Howe, Manager of Manufacturing Engineering who also supervised 25 other employees. Mr. Howe reported to Doug DeHaan, Director of Manufacturing Engineering, who supervised a total of seven managers, all of whom had a number of subordinate employees.

In early July 1991, Mr. DeHaan was informed that a RIF would take place in mid-July. He met with his subordinate managers, including Mr. Howe, advised them of the RIF and explained the RIF selection criteria as performance, potential, and seniority, in that order.

Mr. Howe selected Mr. Doan for the RIF. Mr. Howe testified that he selected Mr. Doan because of his poor performance in the areas of engineering skills, problem solving and communication. Mr. Howe informed Mr. DeHaan of his selection, and Mr. DeHaan gave final approval.

After Mr. Doan was laid off, his position was eliminated. His former job duties were absorbed by the remaining project

engineers, and no one was transferred into his former position or hired to take his place.

II. Waiver

As an initial matter, Mr. Doan contends that Seagate has waived its right to appellate review by failing to include, among other things, the motion or belief for judgment as a matter of law or a new trial. "When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue." *United States v. Vasquez,* 985 F.2d 491, 494 (10th Cir. 1993). Seagate did include the entire trial transcript, as well as the district court's order denying its motion for judgment as a matter of law, or in the alternative, for a new trial, and for remittitur. Because Seagate's appeal is based upon challenges to the evidence and to the sufficiency of the evidence, this is a sufficient record to allow appellate consideration of the issues raised. *See* 10th Cir. R. 10.1.1, 10.3. In any event, Seagate supplemented the record on appeal with the motion and brief, and we discern no prejudice to the appellees from the submission.

III. Judgment As a Matter of Law

Seagate moved for judgment as a matter of law as the close of Plaintiff's case and again at the close of the evidence. The district court denied Seagate's motion for judgment as a matter of law though it found Mr. Doan's evidence "pretty thin." Seagate contends that it should have been granted judgment as a matter of law because Mr. Doan failed to present sufficient evidence to meet his burden of proving intentional age discrimination. We review the denial of a motion for judgment as a matter of law *de novo. Considine v. Newspaper Agency*

Corp., 43 F.3d 1349, 1363 (10th Cir. 1994). We construe the evidence and inferences most favorably to the nonmoving party. *Id.*

Seagate concedes that Mr. Doan met his initial burden of proving a prima facie case under the *McDonnell Douglas* standard. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (setting out the prima facie elements in the reduction-in-force context). However, the existence of a prima facie case does not necessarily preclude judgment as a matter of law against the Plaintiff. *Cf. Ingels*, 42 F.3d at 621-23. As we stated in *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 744 (10th Cir. 1991):

> [A]fter a full trial on the merits, the sequential analytical model adopted from *McDonnell Douglas* . . . drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against him on the basis of age.

Seagate has advanced a legitimate, nondiscriminatory reason for its decision to lay off Mr. Doan, namely the company-wide reduction-in-force. The fact finder may only infer discrimination if Mr. Doan produces evidence that the Seagate's proffered explanation is pretextual and unworthy of credence. *Ingels*, 42 F.3d at 621-22.

Mr. Doan attempted to prove discrimination by attacking the RIF as pretextual. Mr. Doan does not dispute the existence

of a company-wide RIF, but he presented evidence that Seagate was hiring both before and after the RIF, suggesting that Seagate was not actually reducing the size of its workforce. Mr. Doan claimed that the RIF was merely a pretext for pruning away unwanted employees. Speculation, however, will not suffice for evidence.

Mr. Doan's attempt to use Seagate's pre-and post-RIF hirings as evidence of pretext ignores the timing of the hirings. The uncontroverted testimony revealed that no one at Seagate's Oklahoma City plant learned of the RIF until three weeks before it occurred. The fact that Seagate's managers were hiring before they learned of the RIF is irrelevant to proving that the RIF was pretextual. *Accord Viola v. Philips Medical Sys. of North America*, 42 F.3d 712, 718 (2d Cir. 1994) (employee's first adverse performance review occurred on the eve of a RIF, but this was not evidence of pretext because the supervisor was unaware of the impending RIF at the time of the review). One person with a job title similar to Mr. Doan's was hired in July 1991, but that person was hired into a highly specialized job in robotics which Mr. Doan admitted was not comparable to his job and which he admitted he was not capable of performing.

Mr. Doan's evidence of Seagate's post-RIF hirings fails to show pretext because the people hired were not similarly situated to him. The evidence reveals that Seagate did not hire anyone for two months after the RIF, and then after hiring a single 49-year-old for a job dissimilar to Mr. Doan's, did not hire anyone for another two months. Seagate did hire several people beginning in mid-November 1991, more than four months after the RIF, but the evidence reveals that no new Manufacturing Engineers were hired between November 1991 and December 1992. Most of the newly hired individuals were

hired for the direct labor pool, which was not subject to the RIF.[2] the fact that a company is hiring accounting clerks shortly after reducing its engineering workforce does not indicate that the engineering RIF is pretextual. *Cf. Cone v. Longmont United Hosp. Ass'n,* 14 F.3d 526, 532 (10th Cir. 1994) ("To make a comparison demonstrating discrimination, the plaintiff must show that the employees were similarly situated").

Mr. Doan attempted to attack the RIF as pretextual by challenging its necessity. To that end, Mr. Doan presented much evidence tending to show Seagate's financial health and profitability. However, as we have noted before, the wisdom of a RIF is not for a court or jury to decide. A RIF is a business decision, and "[t]he ADEA is not a vehicle for reviewing the propriety of business decisions." *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1426 (10th Cir. 1993).

Mr. Doan attempts to rely on *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416 (10th Cir. 1991), for the proposition that business judgment may be challenged by financial evidence. In *Denison,* the company attempted to justify Plaintiff's termination based on sales figures indicating that Plaintiff's division was less profitable than another. The Plaintiff showed this explanation unworthy of credence with evidence that neither the Plaintiff nor his replacement was involved in sales, the sales figures were not truly comparative, the company had strong financial potential, and the company considered the higher employment cost of older employees in

2. Seagate classified its employees as either "direct labor" or "indirect labor." Indirect labor included employees performing concept and design work, such as engineering. Direct labor included "hands on" type work, such as facilities maintenance. It was undisputed that only indirect labor employees were at risk during the July 1991 RIF.

deciding who to retain. The Plaintiff in *Denison* presented considerable evidence of pretext other than mere evidence of financial health. *Denison*, 941 F.2d at 1421. " '[T]his court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives.' " *Faukner*, 3 F.3d at 1427 (quoting *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1403-04 (10th Cir. 1988)). Financial evidence suggesting that a decision, in hindsight, may not have been prudent is not evidence of improper motive; the ADEA is not violated by erroneous or even illogical business judgment. *Cf. Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) (Title VII case).

Mr. Doan also seeks to infer pretext from the lack of a formal RIF plan and instructions. However, it was undisputed that the RIF criteria were position elimination, performance, potential, and seniority, in that order. Further, the manner in which a company chooses to conduct a RIF is within the company's sound business discretion, and Mr. Doan has failed to adduce any evidence that the RIF criteria were a pretext for discriminatory motive. *Cf. Ingels*, 42 F.3d at 623 (company may alter the rules it uses for conducting a RIF).

Mr. Doan contends that "potential" is a subjective criteria and that the use of subjective criteria creates an inference of discrimination. *See Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982). We find this contention unpersuasive. Even if "potential" is somewhat subjective, the use of subjective criteria does not suffice to prove intentional discrimination. *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1272 (10th Cir. 1988). Future job potential is certainly something that a company might legitimately want to consider

in its RIF decision. Indeed, Congress has recognized potential as a legitimate factor distinct from age; Congress enacted the ADEA to combat "the setting of arbitrary age limits regardless of *potential* for job performance." 29 U.S.C. § 621(a)(2) (emphasis added). Mr. Doan failed to present any evidence that "potential," as interpreted by Seagate's managers, was correlated to age, and even it a correlation between age and potential exists, this would not preclude the use of potential as a selection criteria. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611-12, 113 S.Ct. 1701, 1706-07, 123 L.Ed.2d 338 (1993).

Mr. Doan relies heavily on Seagate's 1992 salary forecast and a forced ranking document which was the precursor to the salary forecast as evidence of pretext; these documents were Mr. Doan's only evidence of specific discrimination against him. Mr. Doan was listed above five younger employees in both documents. Doan contends that the ranking was based on the same criteria used in the RIF and thus the employees at the bottom of the list should have been laid off first. However, this argument ignores the undisputed evidence that Mr. Howe's regular practice was to rank new employees at the bottom. Mr. Howe automatically placed new employees at the bottom because they had not been there long enough for him to properly evaluate their performance, and the uncontroverted evidence revealed that this had been his regular practice for years. Mr. Doan's evidence confirms this; the people below Mr. Doan on the list had all been employed by Seagate for less than six months. Mr. Doan was ranked last of the employees who were not new hires and had been last in prior years as well.

In light of Mr. Howe's regular listing procedures, the fact that younger, newly hired engineers were listed below Mr. Doan on salary forecast documents in not evidence that he was

selected for the RIF because of his age. This court addressed a similar situation in *Fallis* where all employees rated "4" or "5" were selected for a RIF but first-year employees were not rated and thus were exempt. The *Fallis* court, reversing a jury verdict in favor of the Plaintiff, found this policy did not raise any inference of age discrimination, stating:

> [A]ge may have entered indirectly into the decision to terminate [the plaintiff], but plaintiff fails to establish that the decision was not controlled by other nondiscriminatory factors. Not evaluating first-year employees when there is no basis upon which to assess their performance does not suggest age discrimination.

Fallis, 944 F.2d at 745. Similarly, in this case Mr. Howe excluded new hires from the RIF because he had not had enough time to evaluate them. *See id.* Because new hires were automatically placed at the bottom of the salary forecast, the fact that one of the newly hired employees below Mr. Doan was not selected for the RIF instead of Mr. Doan does not suggest age discrimination.

Further, and perhaps more importantly, there was no evidence that the five employees below Mr. Doan on the list were similarly situated to him. While their job titles may have been similar, it was uncontroverted that the other five employees were degreed electrical engineers, which Mr. Doan was not. *Cf. Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1458 (10th Cir. 1994) (lower-ranking younger employee was more qualified because he possessed a college degree which plaintiff did not have). Mr. Doan's broad job title encompassed many

different types of engineers, and a degreed electrical engineer is not similarly situated to an undergreed industrial engineer who coordinates shipping, even if both have the same job title. Mr. Doan failed to show that he was similarly situated to the younger employees not selected for the RIF, or that his selection was due to his age.

Mr. Doan suggests that age discrimination can be inferred because a greater percentage of older workers were selected for the RIF while a greater percentage of younger people were hired afterwards. While statistical evidence may create an inference of discrimination, the evidence may be so flawed as to render it insufficient to raise a jury question. *Fallis*, 944 F.2d at 746. "Statistics taken in isolation are generally not probative of age discrimination." *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995). In this case, Mr. Doan's statistical evidence is flawed because it failed to compare similarly situated individuals and failed to eliminate nondiscriminatory reasons for the numerical disparties. Mr. Doan's statistics grouped employees together regardless of specialty or skill and ignored the fact that only the indirect labor force was at risk for the RIF while most of the new hires were direct labor. " 'A plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals.' " *Cone*, 14 F.3d at 532 (quoting *Fallis*, 944 F.2d at 746) (emphasis in original). Statistical evidence which fails to properly take into account non-discriminatory explanations does not permit an interence of pretext. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994).

After a careful review of the record in this case, we have determined that even in the light most favorable to him, Mr.

Appendix C

Doan has failed to produce evidence sufficient to demonstrate pretext and to carry his burden of proving intentional age discrimination. Accordingly, we hold that the district court erred in denying Seagate's motion for judgment as a matter of law. Because we find that judgment as a matter of law should be granted in favor of the Defendant, we need not reach the other issues raised in this appeal.

REVERSED and REMANDED for entry of judgment in accordance with this opinion.

APPENDIX D — OPINION OF THE COURT IN *FURR ET AL. V. SEAGATE TECHNOLOGY, INC.* DATED MAY 1, 1996

Robert S, FURR, Leslie Woosley, Bernard E. Ozinga, Plaintiffs-Appellees,

v.

SEAGATE TECHNOLOGY, INC., Defendant-Appellant.

No. 95-6181.

United States Court of Appeals,
Tenth Circuit.

May 1, 1996.

* * *

Appeal from the United States District Court for the Western District of Oklahoma, David L. Russell, Judge (D.C. No. CIV-93-939-R).

Gary C. Pierson (Tony G. Puckett and Rochelle L. Huddleston, with him on the brief), of Lytle Soulé & Curlee, Oklahoma City, Oklahoma, for Defendant-Appellant.

Mark Hammons of Hammons & Associates, Oklahoma City, Oklahoma, for Plaintiffs-Appellees.

Before BALDOCK, McWILLIAMS and KELLY, Circuit Judges.

Appendix D

PAUL KELLY, Jr., Circuit Judge.

Plaintiffs-Appellees Robert S. Furr, Leslie Woosley, and Bernard E. Ozinga allege that their employment with Defendant-Appellant Seagate Technology, Inc. was terminated because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 USC §§ 621-34, and Oklahoma public policy.[1] The case was tried to a jury, which returned a verdict in favor of the Plaintiffs. Seagate filed a motion for judgment as a matter of law or a new trial, which was denied by the district court. This appeal followed.

I. Background

Seagate designs, manufactures and markets hard disk drives for computer systems. It has plants in 17 countries and over 30,000 employees worldwide. Seagate commenced operation in Oklahoma City on October 1, 1989, after purchasing an existing facility from another disk drive company. The Oklahoma City plant employed approximately 2,000 people.

In June 1991, Seagate's senior management determined that certain cost-containment measures would have to be taken to address an anticipated decline in profit margins. These measures included a company-wide reduction-in-force ("RIF"). The RIF was not undertaken as a desperate measure,

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1. Plaintiffs concede that the intervening case of *List v. Anchor Paint Manufacturing Co.*, 910 P.2d 1011 (Okla.1996), disallows their state law claims. In *List*, the Oklahoma Supreme Court held that Oklahoma does not recognize a wrongful discharge claim predicated on Oklahoma public policy where the plaintiff has a statutory cause of action. *Id.* at 1013.

but rather as a strategic business decision aimed at improving the company's position in the highly competitive hard disk drive market.

The initial RIF occurred in July 1991, with a second, smaller RIF in August 1991. Approximately 1,200 employees were laid off from Seagate nationwide, including fifty-four from Oklahoma City.

Plaintiffs Furr, Woosley, and Ozinga were employed by Seagate at its Oklahoma City plant, and all three were ultimately selected for the RIF. All three worked in separate departments in a hierarchy of about 240 employees called Design Engineering headed by vice-president Miran Sedlacek. Design Engineering included a variety of diverse talents and disciplines, and the three Plaintiffs worked for different managers and performed vastly different jobs.

Mr. Furr, 53, was a senior drafter who performed electrical drafting. James Becker was Furr's immediate supervisor. Mr. Becker reported to Bill Diffin, Director of Engineering Services, who in turn reported to Mr. Sedlacek.

Mr. Woosley, 58, was an engineering support specialist who worked in the photo lab, photocopying artwork master prints for other employees to use in making printed circuit boards. Stan Young was Mr. Woosley's immediate supervisor. Mr. Young, like Mr. Becker, also reported to Mr. Diffin.

Mr. Ozinga, 62, was a senior consulting mechanical engineer who worked on the mechanical areas of disk drive design. David West, Director of Advanced Technology and Concepts, was Mr. Ozinga'a immediate supervisor, and Mr. West reported directly to Mr. Sedlacek.

Appendix D

In early July, 1991, Mr. Sedlacek was informed about the planned RIF and was told that the reduction would be 15% for his organization. Mr. Sedlacek called a meeting of the five directors under him, including Mr. Diffin and Mr. West, and instructed them to cut 15% of the employees in their respective groups. Mr. Sedlacek did not tell his directors who to select, nor did he personally select any employees for the RIF.

After the directors talked to their managers, and the managers and supervisors made their selections, Mr. Sedlacek held two meetings with all of his directors to discuss their selections. The focus of these meeting was to ensure that the functions selected would cause the least harm to the company.

A. Mr. Furr's Selection

After meeting with Mr. Sedlacek, Mr. Diffin met with the five managers under him, including Mr. Becker and Mr. Young, to inform them of the RIF. Mr. Diffin explained that each department would still have the same amount and type of work after the RIF and instructed his managers to select those that would least harm their department's ability to continue their operations. Each manager was required to select only employees from his own department. Mr. Diffin informed Mr. Becker that he would have to select two employees for the RIF.

Mr. Becker supervised 14 employees, 9 engineers and 5 technicians. He determined that his two selections had to be from the technicians because the engineers could perform the work of the technicians, but the converse was not true. Mr. Becker then examined the tasks that each of the technicians was performing. Two were preparing printed circuit board layouts, another was performing several tasks, including new document

production and photo lab and microfilm backup, and Mr. Furr and another technician, Modesto Adoptante, 58, were making engineering change orders and updating upgrades. In order to maintain people performing all of the various tasks, Mr. Becker selected one of the two technicians preparing circuit board layouts for the RIF and selected Mr. Furr over Mr. Adoptante. Mr. Becker testified that the selection decision was entirely his and that he kept Mr. Adoptante because he felt Mr. Adoptante was more productive than Mr. Furr. Mr. Becker based his selections exclusively on job elimination and productivity. After his layoff, Mr. Furr's job duties were performed by Mr.. Adoptante and later absorbed by others in Mr. Becker's group; no one was transferred into Mr. Furr's former position or hired to take his place.

B. Mr. Woosley's Selection

Mr. Young also learned of the RIF in the early July meeting with Mr. Diffin, and Mr. Diffin told Mr. Young that he would have to select one person for the RIF. Mr. Young selected a temporary employee who would eventually depart anyway. It was unclear at the time whether the termination of a temporary employee would count toward the RIF requirements. Although the temporary employee was approved for the July RIF, Mr. Young reviewed his department to determine who he would pick if another selection was necessary.

Mr. Young's department consisted of nine employees, including the temporary. Three were scientists with degrees in chemistry; three employees, including the temporary, worked in the SMT lab; one independently operated the printed circuit lab; one maintained the specialized inventory of components used in the engineering department; and Mr. Woosley ran the

photo lab. Mr. Young determined that the scientists, with their specialized knowledge, were indispensable, as were the employees operating the printed circuit lab and maintaining the specialized inventory. Mr. Young did not think that he could operate the SMT lab with only a single person (after losing the temporary), making the two remaining SMT lab employees vital. Thus, Mr. Young reasoned that Mr. Woosley was the next most expendable individual, behind the temporary, especially because other people under Mr. Diffin's management umbrella could, and had, performed Mr. Woosley's job in the photo lab.

Shortly after the July RIF, Mr. Diffin called a meeting of his managers, including Mr. Young, and announced that the group needed to lose another person. Mr. Diffin told Mr. Young that his department would lose the additional person, and Mr. Young agreed with that decision because every other department under Mr. Diffin had lost a permanent employee while he had only lost a temporary. Mr. Young selected Mr. Woosley, focusing exclusively on position elimination. Mr. Woosley's photo lab position was eliminated, although the photo lab duties still needed to be performed. A four-person weekly rotation was set upon to handle Mr. Woosley's former photo lab responsibilities, and this rotation system lasted two years. No one was hired into Mr. Woosley's former position.

C. Mr. Ozinga's Selection

Mr. West, Mr. Ozinga's manager, first learned of the RIF at the early July meeting with Mr. Sedlacek. Mr. West's organization consisted of eight specialized departments and developed integrated circuits. The technical employees in Mr. West's group were all electrical engineers, except Mr. Ozinga who was a mechanical engineer. Mr. Ozinga and one other consulting engineer reported directly to Mr. West.

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Mr. West attempted to determine which specialities could be selected that would least impact his organization. He met with his managers and developed a RIF list, which included Mr. Ozinga because he was underutilized. Mr. West testified that a mechanical engineer, Mr. Ozinga was an unnecessary luxury for his group, and he was unable to keep Mr. Ozinga busy, relying on other departments to provide work for him. In part due to his underutilization, Mr. Ozinga was considered a moderate to low performer, ranked among the bottom 15% of employees in Mr. West's department in performance.

Mr. West and the other directors under Mr. Sedlacek met with Mr. Sedlacek to discuss the people selected for the RIF. At that meeting Mr. West argued for the retention of some of his employees, including Mr. Ozinga. Mr. West succeeded in having one employee, Mr. Jantz, 57, retained because there were other functions he could perform, but Mr. West could not convince the other managers to matriculate Mr. Ozinga into their departments. The other consulting engineer, five years older than Mr. Ozinga, was not selected for the RIF.

II. Waiver

As an initial matter, Plaintiffs contend that Seagate has waived its right to appellate review by failing to include, among other things, the motion or brief for judgment as a matter of law, a new trial, or remittitur. "When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue." *United States v. Vasquez*, 985 F.2d 491, 494 (10th Cir.1993). Seagate did include the entire trial transcript, as well as the district court's order denying its motion for judgment as a matter of law, or in the alternative, for a new trial, and for

remittitur. Because Seagate's appeal is based upon challenges to the evidence and to the sufficiency of the evidence, this is a sufficient record to allow appellate consideration of the issues raised. *See* 10th Cir. R. 10.1.1, 10.3. In any event, Seagate supplemented the record on appeal with the motions and briefs, and we discern no prejudice to the appellees from this submission.

III. Judgment As a Matter of Law

Seagate contends that it should have been granted judgment as a matter of law because Plaintiffs failed to present sufficient evidence to meet their burden of proving intentional age discrimination. We review the denial of a motion for judgment as a matter of law *de novo*. *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1363 (10th Cir.1994). We construe the evidence and inferences most favorably to the nonmoving party. *Id.*

Seagate concedes that Plaintiffs met their initial burden of proving a prima facie case under the *McDonnell Douglas* standard. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir.1994) (setting out the prima facie elements in the reduction-in-force context). However, the existence of a prima facie case does not necessarily preclude judgment as a matter of law against the Plaintiffs. *Cf. Ingels*, 42 F.3d at 621-23. As we stated in *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 744 (10th Cir.1991).

> [A]fter a full trial on the merits, the sequential analytical model adopted from *McDonnell Douglas* . . . drops out and we

> are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against him on the basis of age.

Seagate has advanced a legitimate, nondiscriminatory reason for its decision to lay off the Plaintiffs, namely the company-wide reduction-in-force. The fact finder may only infer discrimination if the Plaintiffs produce evidence that the Defendant's proffered explanation is pretextual and unworthy of credence. *Ingels*, 42 F.3d at 621-22.

The Plaintiffs in this case attempted to prove discrimination by attacking the RIF as pretextual. Plaintiffs do not question the existence of a company-wide RIF, but they challenge the necessity of the RIF. Plaintiffs presented much evidence tending to show Seagate's financial health and profitability, including evidence that Seagate was hiring shortly before and after the RIF.

Plaintiffs' attempt to use Seagate's pre- and post-RIF hirings as evidence of pretext ignores the timing of the hirings. The uncontroverted testimony revealed that no one at Seagate's Oklahoma City plant learned of the RIF until late June 1991, a few weeks before it occurred. The fact that Seagate's managers were hiring before they learned of the RIF is irrelevant to proving that the RIF was pretextual. *Accord Viola v. Philips Medical Sys. of North America*, 42 F.3d 712, 718 (2d Cir.1994) (employee's first adverse performance review occurred on the eve of a RIF, but this was not evidence of pretext because the supervisor was unaware of the impending RIF at the time of the review).

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Plaintiffs' evidence of Seagate's post-RIF hirings fails to show pretext because the people hired were not similarly situated to the Plaintiffs. The evidence reveals that Seagate did not hire anyone for two months after the RIF, and then after hiring a single 49-year-old for a job dissimilar to the Plaintiffs', did not hire anyone for another two months. Seagate did hire several people beginning in mid-November 1991, more than four months after the RIF, but Plaintiffs' evidence reveals that the newly hired individuals were not hired into Plaintiffs' positions or positions comparable to theirs.[2] Most of the newly hired individuals were hire for the direct labor pool, which was not subject to the RIF.[3] The fact that a company is hiring accounting clerks shortly after reducing its engineering workforce does not indicate that the engineering RIF is pretextual. *Cf. Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 532 (10th Cir. 1994) ("To make a comparison, demonstrating discrimination, the plaintiff must show that the employees were similarly situated.").

Plaintiffs attempted to attack the RIF as pretextual by challenging its necessity. To that end, Plaintiffs presented much evidence tending to show Seagate's financial health and

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2. Mr. Ozinga claims that a mechanical engineer was hired on July 15, 1991, but the evidence reveals that the person hired was actually a manufacturing advisory engineer, not a mechanical engineer. There was no evidence that this position was similar to Mr. Ozinga's or that Mr. Ozinga was qualified for this position.

3. Seagate classified its employees as either "direct labor" or "indirect labor." Indirect labor included employees performing concept and design work, such as engineering. Direct labor included "hands on" type work, such as facilities maintenance. It was undisputed that only indirect labor employees were at risk during the July 1991 RIF.

profitability. However, as we have noted before, the wisdom of a RIF is not for a court or jury to decide. A RIF is a business decision, and "[t]he ADEA is not a vehicle for reviewing the propriety of business decisions." *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1426 (10th Cir.1993).

Plaintiffs attempt to rely on *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416 (10th Cir.1991), for the proposition that business judgment may be challenged by financial evidence. In *Denison*, the company attempted to justify Plaintiff's termination based on sales figures indicating that Plaintiff's division was less profitable than another. The Plaintiff showed this explanation unworthy of credence with evidence that neither the Plaintiff nor his replacement was involved in sales, the sales figures were not truly comparative, the company had strong financial potential, and the company considered the higher employment cost of older employees in deciding who to retain. The Plaintiff in *Denison* presented considerable evidence of pretext other than mere evidence of financial health. *Denison*, 941 F.2d at 1421. " '[T]his court will not second guess business decisions made by employees, in the absence of some evidence of impermissible motives.' " *Faulkner*, 3 F.3d at 1427 (quoting *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1403-04 (10th Cir.1988)). Financial evidence suggesting that a decision, in hindsight, may not have been prudent is not evidence of improper motive; the ADEA is not violated by erroneous or even illogical business judgment. *Cf. Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir.1993) (Title VII case).

Plaintiffs also seek to infer pretext from the lack of a formal RIF plan and instructions. However, it was undisputed that the written RIF criteria were position elimination, performance,

potential, and seniority, in that order. Further, the manner in which a company chooses to conduct a RIF is within the company's sound business discretion, and Plaintiffs have failed to adduce any evidence that the RIF criteria were a pretext for discriminatory motive. *Cf. Ingels*, 42 F.3d at 623 (company may alter the rules it uses for conducting a RIF).

The Plaintiffs in this case produced statistical evidence purportedly showing a correlation between age and discharge. While statistical evidence may create an inference of discrimination, the evidence may be so flawed as to render it insufficient to raise a jury question. *Fallis*, 944 F.2d at 746. In this case, Plaintiffs' statistical evidence is so flawed because it failed to compare similarly situated individuals. Plaintiffs' statistics grouped all employees together regardless of specialty or skill and failed to take into account nondiscriminatory reasons for the numerical disparities. " 'A plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals.' " *Cone*, 14 F.3d at 532 (quoting *Fallis*, 944 F.2d at 746) (emphasis in original). Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994).

Plaintiffs contend that Seagate used subjective criteria in selecting individuals for the RIF and that the use of subjective criteria creates an inference of discrimination. *See Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982). Specifically, Plaintiffs take issue with the use of "potential" as a selection criteria. Plaintiffs argue that "potential" is

subjective and that the use of "potential" as a criteria disparately impacts older employees. We find these contentions unpersuasive.

First, even if "potential" is somewhat subjective, the use of subjective criteria does not suffice to prove intentional age discrimination. *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1272 (10th Cir.1988). Second, any disparate impact that the use of "potential" may have is insufficient to state a claim under the ADEA because disparate impact claims are not cognizable under the ADEA. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.1996).[4] The plain language of the ADEA recognizes that disparate impact may be due to "reasonable factors other than age." 29 U.S.C. § 623(f)(1); *see Ellis*, 73 F.3d at 1008. Future job potential is certainly something that a company might legitimately want to consider in its RIF decision. Indeed, Congress has recognized potential as a legitimate factor distinct from age; Congress enacted the ADEA to combat "the setting of arbitrary age limits regardless of *potential* for job performance." 29 U.S.C. § 621(a)(2) (emphasis added). Simply because there may be a correlation between age and potential does not mean that potential cannot be used as a selection criteria. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12, 113 S.Ct. 1701, 1706-07, 123 L.Ed.2d 338 (1993).

Further, in this case, the uncontroverted testimony of the various managers who chose the Plaintiffs for the RIF shows

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4. While disparate impact may be evidence of intentional discrimination in certain cases. *Hiatt v. Union Pacific Railroad Co.*, 65 F.3d 838, 842 n. 4 (10th Cir.1995). Plaintiffs failed to present evidence that "potential," as interpreted by Seagate's managers, was correlated to age. *See Rea*, 29 F.3d at 1458.

that the managers looked only to job elimination and performance, not potential, in selecting the Plaintiffs. All three managers responsible for the terminations explained in detail why they believed Plaintiffs' positions were the least important to their departments, and there was no suggestion that "potential" ever entered into the decision. *See Rea*, 29 F.3d at 1458.

Plaintiffs contend that pretext can be inferred from the fact that not every department was subjected to the RIF. Specifically, Plaintiffs point to eight "predominantly younger" work groups under Sedlacek which were unaffected by the RIF. The undisputed testimony reveals that Sedlacek told his five subordinate directors to make selections from their departments for the RIF and that the individual directors then made their decisions after assessing the needs of their various groups. The fact that Sedlacek's managers choose to leave some work groups intact does not necessarily indicate pretext. Sedlacek's managers were asked to make business judgments as to which employees they could best do without, and the fact that some departments were unaffected may be a natural consequence of the greater perceived importance of certain departments. Plaintiffs have not produced any evidence indicating that the unaffected departments were similarly situated or performed identical functions to the affected departments, or that the departments were selected because of age. In the absence of any evidence of an illegal ulterior motive, courts and juries cannot presume to question the business judgment of company managers. *See Faulkner*, 3 F.3d at 1426; *Sanchez*, 992 F.2d at 247.

Plaintiffs claim that they were better qualified than other younger retained employees, allowing an inference of pretext.

However, both Mr. Ozinga and Mr. Woosley were selected for the RIF solely on the basis of position elimination, making their qualifications irrelevant. Mr. Woosley disputes the fact that his position was eliminated because his photo lab responsibilities were still performed after his layoff. However, the test for position elimination is not whether the responsibilities were still performed, but rather whether the responsibilities still constituted a single, distinct position. Mr. Woosley's former responsibilities were divided up and absorbed by a four-person rotation of existing employees, and no new person took over his former responsibilities.

Mr. Furr was selected on the basis of position elimination and performance, making his qualifications relevant only in relation to other employees performing the same functions. Mr. Furr's manager, Mr. Becker, compared Mr. Furr to the other employee in the department performing the same duties and determined that the other employee was a superior performer. It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance. *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir.1988).

Plaintiffs rely heavily on Seagate's 1992 salary forecasts, arguing that the forecasts were based on the same criteria used in the RIF and thus the employees at the bottom of the forecast should have been laid off first. However, as the Plaintiffs own witness conceded, the salary forecasts fail to take into account the possibility of position elimination. Further, Plaintiffs attempt to rely on salary forecasts which combine persons of various occupations from different departments, ignoring the uncontroverted testimony that managers were only allowed to select individuals from within their own departments. Plaintiffs

presented no evidence that they were similarly situated to the other employees on the forecasts. The undisputed fact that each manager could only select from individuals in his own department negates the value of an interdepartmental ranking in showing pretext. Considering only the individuals in each manager's individual department, each plaintiff was ranked the lowest of those similarly situated to him.

Finally, as circumstantial evidence of pretext, Plaintiffs claim that Sedlacek, West and Diffin all ranked their subordinate managers in order of age. While older managers were ranked lower on a whole by these three managers, the uncontroverted testimony was that age was not a factor in the rankings nor were ages included on the rankings. Plaintiffs have produced absolutely no evidence that age was a factor in these rankings, and Plaintiffs each concede that they did not believe their managers would intentionally discriminate on the basis of age. A statistical coincidence does not rise to the level of pretext.

After a careful review of the record in this case, we have determined that even in the light most favorable to the them, Plaintiffs have failed to produce evidence sufficient to demonstrate pretext and to carry their burden of proving intentional age discrimination. Accordingly, we hold that the district court erred in denying Seagate's motion for judgment as a matter of law. Because we find that judgment as a matter of law should be granted in favor of the Defendant, we need not reach the other issues raised in this appeal.

REVERSED and REMANDED for entry of judgment in accordance with this opinion.

APPENDIX E —ORDER OF THE DISTRICT COURT DENYING SEAGATE'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVE NEW TRIAL IN *DOAN V. SEAGATE TECHNOLOGY, INC.* FILED APRIL 15, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-93-1210-R

JACK L. DOAN,

Plaintiff,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant

ORDER

Before the Court is the Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial.

I. Motion for Judgment as a Matter of Law

A. Standard Governing JMOL Motions

In ruling on the Defendant's Motion for judgment as a matter of law, the Court must view the evidence and indulge all inferences in favor of the opposing party. The Court is not permitted to weigh the evidence, consider the credibility of the witnesses, or substitute its judgment for that of the jury. *Brown*

v. McGraw Edison Co., 736 F.2d 609, 613 (10th Cir. 1984), *Equal Employment Opportunity Commission v. University of Oklahoma*, 774 F.2d 999, 1001 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986). The Court's inquiry is "whether there is evidence upon which the jury could properly find a verdict for [the non-moving] party." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984). If there is such evidence, the motion must be denied. *Id. See also Orth v. Emerson Electric Co.*, 980 F.2d 632, 635 (10th Cir. 1992); *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S.Ct. 1685, 114 L. Ed.2d 80 (1991). A motion for judgment as a matter of law may be granted only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the verdict. *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974); *Equal Employment Opportunity Commission v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d. 289 (1985).

B. Sufficiency of Evidence of Discriminatory Intent

The Defendant argues that the Plaintiff, Jack L. Doan, failed to meet his burden of proving that he was "intentionally discriminated against" because of his age. The Plaintiff's burden, with regard to his Age Discrimination in Employment Act ("ADEA") claim, was to show that his age was a "determining factor" in the Defendant's decision to discharge him. *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir. 19__); *Equal Employment Opportunity Commission v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir. 1988). To prevail on his state law public policy claim, the Plaintiff was required to show that his age was a "significant factor" in the decision to

discharge him. *Tate v. Browning-Ferris*, 833 P.2d 1218, 1219, n. 69 (Okla. 1992).

At trial the Plaintiff offered the following evidence, *inter alia*:

> (a) The Defendant actually hired employees before, during and after the alleged reduction in force. Of these new hires, seventy five percent were under the age of 40;
>
> (b) The Plaintiff had recently been evaluated as performing his job satisfactorily;
>
> (c) There were five new employees working in the Plaintiff's group at the time of the alleged reduction in force. All were under 40 years of age, and all were retained despite the fact that the Plaintiff was ranked higher than all five new hires on two "value ranking" documents prepared by supervisors shortly before his discharge.

This is circumstantial evidence of age discrimination, and amply supports the jury's verdict. *Accord, Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994) (In order for statistical evidence of this nature to raise an inference of discrimination, there must be an adjustment for the various performance evaluations and departmental rankings of the employees included in the statistical pool). In addition, as the Court notes below, the Plaintiff offers indirect evidence from which the jury was permitted to infer discriminatory intent.

Appendix E

C. Evidence of Pretext

The Defendant next asserts that the Court improperly allowed the Plaintiff to challenge whether Seagate actually had a reduction in force. The Defendant argues its "business decision" to reduce its workforce should not have placed in issue. (Defendant's Brief, pp. 3-4). The Defendant's argument misses the point. While the jury as factfinder is not permitted to second-guess an employer's business judgment, the factfinder is, in an appropriate case, called upon to determine whether the "business judgment" explanation offered by the employer is the true reason for its action, or whether it is a mere pretext for discrimination. *Accord, Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1421-22 (10th Cir. 1991). *See also Tatum v. Philip Morris, Inc.*, 809 F. Supp. 1452, 1462 (W.D. Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993), *cert. denied*, __ U.S. __ 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994).

Once a *prima facie* showing is made in an employment discrimination case, evidence that the employer's proffered reason for its action is merely pretextual is admissible. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 660 (1973). The Plaintiff in this case having made a *prima facie* showing of age discrimination, and the Defendant having proffered the company-wide reduction in force as its reason for discharging the Plaintiff, evidence that the Defendant's proffered reason was pretextual was indisputably admissible.

The Plaintiff in this case did not, as the Defendant maintains, merely "second guess" the wisdom of its business decision to reduce its workforce. The Plaintiff's evidence showed, at least, the following: (a) the Defendant's financial

condition was not as dire as it had claimed at the time of the reduction in force, (b) the Defendant was actually *hiring* employees shortly before, during and after the reduction in force and (c) the size of the Defendant's Oklahoma City workforce was not in fact any smaller after the reduction in force than it was shortly before. This evidence was sufficient to support the inference that the reduction in force itself was pretextual.

Having reviewed all of the evidence, the Court finds that there is ample evidentiary support for the jury's verdict. The Defendants are not entitled to judgment as a matter of law pursuant to Rule 50(b), Fed. R. Civ. Pro.

II. Motion for New Trial

The Defendant moves for a new trial on the ground that the jury's verdict is against the weight of the evidence, and on the alternative ground that the Court improperly admitted the Plaintiff 's evidence of other alleged discriminatory acts by the Defendant.

A new trial should not be granted based upon insufficient evidence unless the verdict is "clearly, decidedly, or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir. 1984); *Champion Home Builders v. Shumate*, 388 F.2d 806, 808 (10th Cir. 1967). In this case, the Court finds that the jury's verdict is amply supported by the evidence, and that a new trial is not warranted.

The Defendant's alternative ground for a new trial is that the Court improperly certain evidence including the testimony

of Kenneth Bennett, a former Seagate employee who successfully brought an age discrimination claim as a result of the same RIF, and evidence of the race and/or medical condition of certain other employees who were discharged during the RIF. Mr. Bennett's testimony was relevant on the issue of the Defendant's intent, and was properly admitted.

The Court initially sustained the Defendant's objection to counsels remarks during opening statement, indicating that certain younger (under age 40) employees who were discharged during the reduction in force had heart conditions or brain tumors, or were black. During the course of the trial, however, defense counsel repeatedly elicited testimony that many of the persons fired during the reduction in force were young or even the youngest in their working groups. After the Defendant opened the door to this issue, evidence of the race and/or disability status of these individuals became relevant and was properly admitted. A new trial is not warranted in this case.

III. Conclusion

The Defendant's Motion for Judgment as a Matter of Law, and Motion for New Trial is hereby DENIED.

IT IS SO ORDERED this 12th day of April, 1994.

s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX F — JUDGMENT OF THE DISTRICT COURT IN *DOAN V. SEAGATE TECHNOLOGY, INC.* FILED OCTOBER 5, 1994

UNITED STATES DISTRICT COURT
Western District of Oklahoma

CASE NUMBER: CIV-93-1210-R

JACK L. DOAN

Plaintiff

v.

SEAGATE TECHNOLOGY, INC.

Defendant.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

October 5, 1995
Date

s/ ROBERT D. DENNIS
Clerk

s/ Nancy Estep
(By) Deputy Clerk

ENTERED IN JUDGMENT ON 10-5-94

APPENDIX G — AMENDED JUDGMENT OF THE DISTRICT COURT IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED APRIL 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

JUDGEMENT IN A CIVIL CASE

AMENDED JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED we the jury find in favor of the PLAINTIFFS and against the defendant on all claims and find damages in the following amounts:

ROBERT S. FURR:	$231,157.98
LESLIE WOOSLEY:	$253,815.71
BERNARD OZINGA:	$951,340.93

Appendix G

Pursuant to Rule 60(a) Fed.R.Civ.Proc., the amounts contained herein correct a mathematical error contained in the Judgment entered on April 12, 1995.

Date April 17, 1995

s/ Robert D. Dennis
Robert D. Dennis
Clerk

s/ Nancy Estep
Nancy Estep
(By) Deputy Clerk

ENTERED IN JUDGMENT DOCKET ON APRIL 17, 1995

APPENDIX H — JUDGMENT OF THE DISTRICT COURT IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED APRIL 12, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

JUDGEMENT IN A CIVIL CASE

JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED we the jury find in favor of the PLAINTIFFS and against the defendant on all claims and find damages in the following amounts:

ROBERT S. FURR:	$233,415.83
LESLIE WOOSLEY:	$256,083.56
BERNARD OZINGA:	$953,598.78

Appendix H

s/ Robert D. Dennis
Robert D. Dennis
Clerk

Date April 12, 1995

s/ Nancy Estep
Nancy Estep
(By) Deputy Clerk

ENTERED IN JUDGMENT DOCKET ON APRIL 12, 1995

APPENDIX I — ORDER OF THE DISTRICT COURT DENYING SEAGATE'S MOTION FOR JUDGMENT AS A MATTER OF LAW, ALTERNATIVE NEW TRIAL AND REMITTITUR IN *FURR, ET AL. V. SEAGATE TECHNOLOGY, INC.* FILED APRIL 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

ORDER

Before the Court is the Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial, and for Remittitur.

I. *Motion for Judgment as a Matter of Law*

A. *Standard Governing JMOL Motions*

In ruling on the Defendant's Motion for judgment as a matter of law, the Court must view the evidence and indulge all inferences in favor of the opposing party. The Court is not permitted to weigh the evidence, consider the credibility of the witnesses, or substitute its judgment for that of the jury. *Brown*

v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984), *Equal Employment Opportunity Commission v. University of Oklahoma*, 774 F.2d 999, 1001 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986). The Court's inquiry is "whether there is evidence upon which the jury could properly find a verdict for [the non-moving] party." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984). If there is such evidence, the motion must be denied. *Id. See also Orth v. Emerson Electric Co.*, 980 F.2d 632, 635 (10th Cir. 1992); *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S.Ct. 1685, 114 L.Ed.2d 80 (1991). A motion for judgment as a matter of law may be granted only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the verdict. *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974); *Equal Employment Opportunity Commission v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d. 289 (1985).

B. *Statistical Evidence*

The Defendants first argue that the Plaintiffs' statistical analysis should not have been admitted into evidence, citing *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) and *Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994). In *Fallis, supra*, the Tenth Circuit noted that it is "uniformly recognized" that statistical data showing an employer's conduct toward a protected class can create an inference of discrimination. *Fallis*, 944 F.2d at 746; *citing Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U. S. 878, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990). The Court found, however, that there were two problems with

the plaintiff's statistical evidence in that case which rendered it insufficient to raise a jury question on the ultimate issue of age discrimination. First, the Court noted, the statistical group, comprised of geologists over age forty, was too small (only nine persons) to provide reliable statistical results. Second, in order for statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals. *Fallis*, 944 F.2d at 746, *citing Segar v. Smith*, 738 F.2d 1249, 1274 (D. C. Cir. 1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). The evidence showed that those geologists who were terminated had lower proficiency ratings than those who were retained, and there was no evidence that any of the under-forty geologists who were retained had lower performance ratings. Under these circumstances, including the absence of any evidence of pretext, the statistics relied upon by the plaintiff did not permit an inference of age discrimination. *Fallis*, 944 F.2d at 746-747. *See also Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994) (In order for statistical evidence of this nature to raise an inference of discrimination, there must be an adjustment for the various performance evaluations and departmental rankings of the employees included in the statistical pool).

The Tenth Circuit did not suggest, in *Rea* or in *Fallis*, that statistical evidence was in all cases *inadmissible;* rather, the Court held in both cases that the statistical evidence before it was insufficient to support an inference of discrimination. In *Fallis*, the Court noted that such a small statistical sample carried "little or no probative force to show discrimination." 944 F.2d at 746. In this case, the Plaintiffs' statistical evidence was supported by a much larger sample. Further, the Plaintiffs'

statistical evidence in the instant case consisted of more than a raw comparison of the ages of those employees who were terminated with the ages of those who were retained. Each of the Plaintiffs in this case offered evidence that his performance and/or qualifications were higher than those of younger employees who were retained. Furthermore, the Plaintiffs here did not rely solely upon their statistical evidence to raise an inference of age discrimination. The Court is satisfied that the statistical evidence offered by the Plaintiffs in the instant case is admissible, and that, in conjunction with the evidence as a whole, supports an inference of age discrimination.

C. *Evidence of Pretext*

The Defendant next asserts that the Court erred in allowing the Plaintiffs to "challenge whether Seagate had a reduction in force or Seagate's business decision to have the reduction. (Defendant's Brief, p. 4). The Defendant's argument misses the point. While a factfinder is not to second-guess an employer's business judgment, the factfinder is, in many cases, called upon to determine whether the "business judgment" explanation offered by the employer is the true reason for its action, or whether it is a mere pretext for discrimination. *Accord, Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1421-22 (10th Cir. 1991). *See also Tatum v. Philip Morris, Inc.*, 809 F. Supp. 1452, 1462 (W.D. Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993), *cert. denied*, __ U. S. __, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994). Once a *prima facie* showing is made in an employment discrimination case, evidence that the employer's proffered reason for its action is merely pretextual is admissible. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 660 (1973). The Plaintiffs in this case having made a *prima facie* showing of age discrimination, and the

Defendant having proffered the company-wide reduction in force as its reason for discharging the Plaintiffs, evidence that the Defendant's proffered reason was pretextual was indisputably admissible.

The Plaintiffs in this case did not, as the Defendant maintains, merely "second guess" the wisdom of its business decision to reduce its workforce. The Plaintiff's evidence showed, at least, the following: (a) the Defendant's financial condition was not as dire as it claimed at the time of the reduction in force, (b) the Defendant was actually *hiring* employees shortly before, during and after the reduction in force, and (c) the size of the Defendant's Oklahoma City workforce was not in fact any smaller after the reduction in force than it was shortly before. This evidence amply supported the Plaintiffs' theory that the reduction in force itself was pretextual.

In addition, the Plaintiffs offered other evidence in support of their alternative theory, that the "value ranking" process by which they were selected for termination in the reduction in force was a pretext for age discrimination. The Defendant points out that the Plaintiffs had "the ultimate burden of persuading the Court" that they had "been the victims of intentional discrimination." (Defendant's Brief, p. 2, citing *Saint Mary's Honor Center v. Hicks*, __ U.S. __, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 217 (198_)). The Court is satisfied that the Plaintiffs met this burden, either directly by offering circumstantial evidence of age discrimination, or indirectly, with evidence that the reason offered by the Defendant was pretextual. *St. Mary's*, 113 S.Ct. 2742, 125 L.Ed.2d 407 (Where plaintiff shows that proffered

reason was pretextual, the jury may, but is not required, to draw an inference of discrimination).

Having reviewed all of the evidence, the Court finds that there is ample evidentiary support for the jury's verdict. The Defendants are not entitled to judgment as a matter of law pursuant to Rule 50(b), Fed. R. Civ. Pro.

II. *Motion for New Trial*

The Defendants also move for a new trial on the ground that the jury's verdict is against the weight of the evidence, and on the alternative ground that the Court improperly admitted the Plaintiffs' statistical evidence and the Plaintiffs' evidence as to the necessity for a reduction in force.

A new trial should not be granted based upon insufficient evidence unless the verdict is "clearly, decidedly, or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir. 1984); *Champion Home Builders v. Shumate*, 388 F.2d 806, 808 (10th Cir. 1967). In this case, the Court finds that the jury's verdict is amply supported by the evidence, and that a new trial is not warranted.

With regard to the Defendant's claim that a new trial is warranted based upon alleged improper admission of evidence, the Court finds that the Plaintiffs' statistical evidence and evidence challenging the legitimacy of the reduction in force was properly admitted. A new trial is not warranted on this ground.

Appendix I

III. *Motion for Remittitur*

The Defendant seeks remittitur on the grounds that: (1) the front pay awards were not reduced to present value; and (2) the Plaintiffs' back pay awards were not reduced by the amount of unemployment compensation they received from the Oklahoma Employment Security Commission. In addition, the Defendant asserts in a footnote that the front pay awarded to Plaintiffs Woosley and Ozinga should be reduced by reason of their failure to mitigate their damages.

With regard to the Defendant's claim that the front pay awards should be reduced to present value, the Court notes first that, as the parties agreed, the front pay awarded under the ADEA claims was combined with the lost future earnings under the state law tort claims. The jury was instructed that the damages available to each Plaintiff included: "the loss of earnings in the future that the Plaintiff would be reasonably likely to suffer as a direct result of the discharge, if he used reasonable diligence in finding employment of comparable quality." No distinction was made between front pay under the ADEA and future earnings under state law, either in the instructions or on the verdict forms. The Defendant did not request an instruction on reduction of front pay or future earnings to present value; nor did the Defendant offer any evidence on the issue of what that present value might be or how it may be computed. The Court finds, accordingly, that the Defendant has waived any issue as to the present value of the Plaintiffs' front pay or future lost earnings. *Accord, Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1422 (10th Cir. 1991).

Under the ADEA, reinstatement is the preferred remedy. Reinstatement is not ordered, though, where a productive and

amicable working relationship would be impossible. *Equal Employment Opportunity Commission v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1172-1173 (10th Cir. 1985), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985). The Defendant in this case has indicated that it is not willing to consider reinstating any of the Plaintiffs, and it appears that an amicable working relationship would be impossible. The Court finds, therefore, that reinstatement is not appropriate in this case.

The Defendant further asserts that the Plaintiffs' back pay awards should be reduced by the amount of their unemployment insurance benefits. Unemployment compensation is a collateral source, and is not deducted from a damage award. *Equal Employment Opportunity Commission v. Sandia Corp.*, 639 F.2d 600, 626 (10th Cir. 1980) ; *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1555 (10th Cir. 1988) ; *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1138 (10th Cir. 1983), *cert. denied*, 464 U.S. 938, 104 S.Ct. 938, 78 L.Ed.2d 314 (1983). The Defendant is not entitled to a remittitur in the amount of the Plaintiffs' unemployment benefits.

The Defendant next seeks remittitur on the ground that Plaintiffs Woosley and Ozinga failed to mitigate their damages. The jury was instructed that the Plaintiffs' damages for loss of future income were the "loss of earnings that the Plaintiffs would be reasonably likely to suffer as a direct result of the discharge, if he used reasonable diligence in finding employment of comparable quality. . . ." This Instruction adequately covers the Plaintiffs' duty to mitigate their damages, and it must be presumed that the jury followed this Instruction. The Defendant is not entitled to remittitur on the ground of failure to mitigate damages.

Appendix I

IV. *Conclusion*

The Defendant's Motion for Judgment as a Matter of Law, Motion for New Trial or Remittitur is hereby DENIED.

IT IS SO ORDERED this 10th day of April, 1995.

s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX J — ORDER OF THE DISTRICT COURT ASSESSING LIQUIDATED DAMAGES AND PREJUDGMENT INTEREST IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED APRIL 5, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Plaintiffs

vs.

SEAGATE TECHNOLOGY, INC.,

Defendant

ORDER

Before the Court is the plaintiffs, Motion to Assess Liquidated Damages and Prejudgment Interest.

I.

The plaintiffs seek liquidated damages on their ADEA[1] claims, the jury having made a special finding of willfulness with regard to the defendant's termination of each of the three plaintiff's. The defendant correctly points out that liquidated

---

1. Age Discrimination in Employment Act, Title 29 U.S.C. §§ 621, *et seq.*

damages are not automatically awarded upon a finding of liability under the ADEA; liquidated damages may be awarded only if the violation is willful. A violation is willful if the employer either knew that its conduct was prohibited or showed reckless disregard for the matter of whether its conduct was prohibited. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *Hazen Paper Co. v. Biggins*, 507 U.S. __, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

The Supreme Court in *Hazen Paper* rejected the notion that an employer who knowingly relies on age invariably commits a knowing or reckless violation of the ADEA. The Court reasoned that the ADEA is not an unqualified prohibition against discrimination on the basis of age. *Hazen Paper*, 507 U.S. at __, 113 S.Ct. at 1709, 123 L.Ed.2d at 351. The Court noted, for example, that the ADEA affords a bona fide occupational qualification defense, and exemptions for bona fide seniority systems, employee benefit plans, bona fide executives and high policy makers. If an employer incorrectly but in good faith and non-recklessly believes that the ADEA permits a particular age-based decision, then liquidated damages should not be imposed. *Hazen Paper*, 507 U.S. at __, 113 S.Ct. at 1709, 123 L.Ed.2d at 351. Also, liquidated damages should not be imposed against an employer who acts non-recklessly and in good faith in attempting to determine whether its proposed action would violate the ADEA. Read together, *Hazen Paper* and *Thurston* establish that a finding of willfulness does not necessarily or automatically follow whenever there has been a violation of the ADEA. Where, for example, the employer mistakenly but non-recklessly and in good faith believes that its conduct is permitted under some statutory exemption, the violation is not willful.

Appendix J

In this case there is no contention that the defendant believed in good faith that firing Mr. Furr, Mr. Woosley or Mr. Ozinga was permissible based upon any bona fide occupational qualification, seniority system, or employee benefit plan. Nor does the defendant assert that any of the three plaintiffs was a bona fide executive or high policy maker. In short, the defendant does not contend that the ADEA permitted it to consider the age of the plaintiffs, or that it believed non-recklessly and in good faith that it could consider age under any statutory exemption or exception. Likewise, the defendant does not allege that it undertook, non-recklessly and in good faith, any particular efforts to determine whether discharging the plaintiffs would violate the ADEA. *See, e.g., Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (Violation not willful where the employer acted reasonably and in good faith in attempting to determine whether its proposed transfer policy would violate the ADEA. Employer's efforts included obtaining prior advice of counsel on the legality of proposed transfer policy). Rather, the defendant's position throughout this litigation has been a denial that age was a determining factor in its selection of the plaintiffs for termination. The jury found, to the contrary, that the age of each plaintiff was a determining factor in the decision to terminate him, and that the violation was willful. The evidence amply supports the jury's finding in that regard. The Court finds, accordingly, that the plaintiffs are entitled to liquidated damages.

II.

The plaintiffs also seek an award of prejudgment interest on that portion of the judgment which was awarded as compensatory damages for their emotional distress. *See* Title

12 Okla. Stat. §727(2). The defendants argue that an award of liquidated damages under the ADEA precludes an award of prejudgment interest, citing *Blim v. Western Electric Co.*, 731 F.2d 1473 (10th Cir. 1984), *cert. denied sub nom., AT&T Technologies, Inc. v. Blim*, 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984). In *Blim*, the Tenth Circuit held that prejudgment interest was not available under the ADEA if the plaintiffs receive liquidated damages, following the reasoning of the Supreme Court in *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 715, 65 S.Ct. 895, 906, 89 L.Ed. 1296 (1945) (prejudgment interest not available under Fair Labor Standards Act because liquidated damages compensated plaintiffs for any delay).

In this case, the plaintiffs do not seek prejudgment interest on their ADEA award, or on their award for back pay. The plaintiffs seek prejudgment interest only on that portion of their judgment which represents an award of compensatory damages under their state law tort claim. Prejudgment interest is recoverable for that portion of the judgment even though the plaintiffs also recovered damages for which prejudgment interest may not be awarded. *Accord, Timmons v. Royal Globe Ins.*, 713 P.2d 589 (Okla. 1985).

III.

The plaintiffs' Motion to Assess Liquidated Damages and Prejudgment Interest is hereby GRANTED. Plaintiff Robert S. Furr is hereby awarded judgment for liquidated damages in the amount of $60,028.87. Plaintiff Leslie Woosley is hereby awarded judgment for liquidated damages in the amount of $58,548.29. Plaintiff Bernard E. Ozinga is hereby awarded judgment for liquidated damages in the amount of $296,121.04.

Appendix J

Prejudgment interest is hereby assessed at the statutory rate of 7.42% on that portion of each plaintiff's jury award which represents compensatory damages for emotional distress.

IT IS SO ORDERED this 5th day of April, 1995.

s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX K — SPECIAL VERDICT FORM, VERDICT FOR LESLIE WOOSLEY IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED JANUARY 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OLKLAHOMA

CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

Special Verdict Form – Plaintiff Leslie Woosley

I. AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIM

We, the Jury, find with respect to the Plaintiff's Age Discrimination in Employment Act claim:

A. X In favor of the Plaintiff, Leslie Woosley, and against the Defendant, Seagate Technology, Inc.

* * *

If you find in favor of Plaintiff Leslie Woosley on the Age Discrimination in Employment Act claim, answer the

following question. If you find in favor of the Defendant do not answer the following question.

Do you find by a preponderance of the evidence that the Defendant's decision to discharge Plaintiff Leslie Woosley because of his age was willful as defined in the instructions?

X
YES

II. OKLAHOMA PUBLIC POLICY CLAIM

We, the Jury, find with respect to Plaintiff Leslie Woosley's claim of discharge in violation of the public policy of Oklahoma:

A. X In favor of the Plaintiff, Leslie Woosley, and against the Defendant, Seagate Technology, Inc.

* * *

III. DAMAGES

Assess damages only if you find in favor of Plaintiff Leslie Woosley on one or both of his claims.

(1) Lost earnings to date, if any: $58,548.29

(2) Future lost earnings, if any: $65,525.88

(3) Physical or mental distress or anguish, if any: $62,500.00

Appendix K

1-13-95	s/ Suzanne Gilmore
DATE	FOREMAN/FOREWOMAN

APPENDIX L — SPECIAL VERDICT FORM, VERDICT FOR ROBERT S. FURR IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED JANUARY 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OLKLAHOMA

CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

Special Verdict Form -- Plaintiff Robert S. Furr

I. AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIM

We, the Jury, find with respect to the Plaintiff's Age Discrimination in Employment Act claim:

A. X In favor of the Plaintiff, Robert S. Furr, and against the Defendant, Seagate Technology, Inc.

* * *

If you find in favor of Plaintiff Robert S. Furr on the Age Discrimination in Employment Act claim, answer the

following question. If you find in favor of the Defendant do not answer the following question.

Do you find by a preponderance of the evidence that the Defendant's decision to discharge Plaintiff Robert S. Furr because of his age was willful as defined in the instructions?

X
YES

II. OKLAHOMA PUBLIC POLICY CLAIM

We, the Jury, find with respect to Plaintiff Robert S. Furr's claim of discharge in violation of the public policy of Oklahoma:

A. X In favor of the Plaintiff, Robert S. Furr, and against the Defendant, Seagate Technology, Inc.

* * *

III. DAMAGES

Assess damages only if you find in favor of Plaintiff Robert S. Furr on one or both of his claims.

(1) Lost earnings to date, if any: $60,028.87

(2) Future lost earnings, if any: $39,896.99

(3) Physical or mental distress or anguish, if any: $62,500

Appendix L

1-13-95	s/ Suzanne Gilmore
DATE	FOREMAN/FOREWOMAN

APPENDIX M — SPECIAL VERDICT FORM, VERDICT FOR BERNARD E. OZINGA IN *FURR ET AL V. SEAGATE TECHNOLOGY, INC.* FILED JANUARY 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OLKLAHOMA

CIV-93-939-R

ROBERT S. FURR, LESLIE WOOSLEY and BERNARD E. OZINGA,

Plaintiffs,

v.

SEAGATE TECHNOLOGY, INC.,

Defendant.

Special Verdict Form – Plaintiff Bernard E. Ozinga

I. AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIM

We, the Jury, find with respect to the Plaintiff's Age Discrimination in Employment Act claim:

A. X In favor of the Plaintiff, Bernard E. Ozinga, and against the Defendant, Seagate Technology, Inc.

* * *

If you find in favor of Plaintiff Bernard E. Ozinga on the Age Discrimination in Employment Act claim, answer the

following question. If you find in favor of the Defendant do not answer the following question.

Do you find by a preponderance of the evidence that the Defendant's decision to discharge Plaintiff Bernard E. Ozinga because of his age was willful as defined in the instructions?

X
YES

II. OKLAHOMA PUBLIC POLICY CLAIM

We, the Jury, find with respect to Plaintiff Bernard E. Ozinga's claim of discharge in violation of the public policy of Oklahoma:

A. X In favor of the Plaintiff, Bernard E. Ozinga, and against the Defendant, Seagate Technology, Inc.

* * *

III. DAMAGES

Assess damages only if you find in favor of Plaintiff Bernard E. Ozinga on one or both of his claims.

(1) Lost earnings to date, if any: $296,121.04

(2) Future lost earnings, if any: $287,895.60

(3) Physical or mental distress or anguish, if any: $62,500

Appendix M

1-13-95	s/ Suzanne Gilmore
DATE	FOREMAN/FOREWOMAN

Supreme Court, U.S.
FILED
NOV 21 1996
CLERK

No. 96-625

In the

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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45 pp

QUESTIONS PRESENTED

Although petitioners list four issues, their arguments center upon one basic question:

1. Whether employment discrimination cases are a special class of cases such that judgment as a matter of law may never be granted.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. The respondent has no parent companies or subsidiaries.

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No. 96-625

In the

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Seagate Technology, Inc. ("Seagate"), hereby opposes the petition for a writ of certiorari filed by petitioners in the captioned cases, and requests that the petition be denied.

STATEMENT OF THE CASE

Seagate designs, manufactures and markets hard disc drives for computer systems. In 1991, at the time of the

reduction in force ("RIF") in which petitioners were included, Seagate had plants in 17 countries and approximately 30,000 employees worldwide. (Furr, R. Vol. III 502.)

Seagate's senior worldwide management met every month for operational meetings to review business issues. (Furr, R. Vol. III 500-501.) In the June, 1991 meeting, senior management decided that certain cost-containment adjustments would have to be made to address a forecasted depression in its profit margins. (Furr, R. Vol. III 501, 520; Doan, R. Vol. II 72-73; Vol. III 478-481, 493-495.) These adjustments included reducing scrap costs, consolidating customer service and repair operations, refocusing the sales force, not paying profit-sharing at that time and conducting a RIF. (Furr, R. Vol. III 501-502, 518, 520; Doan, R. Vol. II 72-73, 85-86; Vol. III 478-479, 492-495.) The RIF was a strategic business decision aimed at improving Seagate's position in the highly competitive and volatile computer hard disc drive business. (Furr, R. Vol. III 499-500, 505, 507-509; Doan, R. Vol. II 72-73; Vol. III 476-488, 492-495.)

The initial RIF occurred during July, 1991, with a second smaller RIF in August. (Furr, R. Vol. IV 733-734.) Approximately 1,200 employees were laid off nationwide. (Furr, R. Vol. III 503; Doan, R. Vol. III 481.) Fifty-four employees from Oklahoma City were laid off. (Furr, R. Vol. III 503.)

The petitioners were laid off from the Oklahoma City facility. Each petitioner was selected for the RIF by his supervisor based on job elimination and performance. (Furr, R. Vol. III 564; Vol. IV 612, 664-666, 670, 677; Vol. V 1040; Doan, R. Vol. III 317-334, 536-550.) Each of the petitioners in Furr admitted that their supervisors would not intentionally

discriminate against them. (Furr, R. Vol II 194; Vol. III 345; 438-439.)

In their statement of the case, petitioners grossly misstate the evidence they offered at trial. In its first proposition, respondent specifically discusses the misstatements made by petitioners regarding the only area of evidence petitioners rely upon in support of their petition.

REASONS FOR DENYING THE PETITION

1. In their first proposition, petitioners assert there is an "emerging trend" to restrict the jury's function in employment discrimination cases by granting judgment as a matter of law ("JMOL"). Petitioners incorrectly state that the Seventh and Eleventh Circuits deny juries the right to disbelieve the testimony of an interested party and require juries to accept an employer's proffered legitimate, nondiscriminatory reason for an employment action unless there is direct evidence contradicting the employer's stated reason, while the Third and Fifth Circuits follow a different rule. Petitioners also mischaracterize the Tenth Circuit's opinions in these cases as following the Seventh Circuit's approach "in principle." Petitioners' argument is nothing more than a transparent attempt to manufacture a split in the circuits, and to gratuitously include the Tenth Circuit in the split.

The Seventh and Eleventh Circuits do not have a special rule regarding the jury's ability to judge witness credibility. Petitioners cite only one case from these circuits in which appellate review of a jury's right to judge the credibility of witnesses was even discussed, Futrell v. J. I. Case, 38 F.3d 342

(7th Cir. 1994).[1] In Futrell, the case on which petitioners' entire argument hinges, the court stated:

> In reviewing the sufficiency of the evidence in indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the exclusive right to judge credibility."

Id. at 346.[2]

The portion of Futrell quoted and relied upon by petitioners is consistent with cases from this Court. In Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216-18 (1931), also cited by petitioners, the Court stated:

> We recognize the general rule. . .that the question of the credibility of witnesses is one for the jury alone; but this does not mean that

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[1]Collier v. Budd Co., 66 F.3d 886, 893 (7th Cir. 1995), cited by petitioners, merely states that an employee cannot defeat a motion for summary judgment simply by asserting that he was qualified for his position, but rather must offer specific evidence from which the jury may reasonably infer that the proffered reasons are not true. In Howard v. BP Oil Co., 32 F.3d 520, 526 (11th Cir. 1994), the Eleventh Circuit stated that a plaintiff may not withstand summary judgment by merely denying a defendant's credibility but must produce "sufficient evidence to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable." In Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 84 F.3d 1380 (11th Cir. 1996), the court reiterated that the employee must present *evidence* calling into question the veracity of the employer's proffered legitimate nondiscriminatory reason for an employment action.

[2]Petitioners fail to note that the Seventh Circuit in Futrell reversed a grant of judgment as a matter of law for the defendant and reinstated the jury verdict in the plaintiff's favor.

> the jury is at liberty under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. . . .The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. . . .[W]e are of opinion that this was not enough to take the question to the jury, and that the court should have so held.
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> * * *
>
> "Generally, the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. Where. . .the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

See also Pence v. United States, 316 U.S. 332, 340 (1942) (evidence did not serve to contradict, qualify or explain party's admissions); Neely v. Eby Construction Co., 386 U.S. 317 (1967) (appellate court has discretion to enter judgment notwithstanding the verdict); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (affirming circuit court's entry of judgment notwithstanding the verdict on plaintiff's anti-trust claim); United States v. Generes, 405 U.S. 93, 106-107 (1972) (the Court itself granted judgment notwithstanding the verdict, thereby determining a case in which the central

issue was a taxpayer's motivation); A. B. Small Co. v. Lamborn & Co., 267 U.S. 248, 254 (1925).[3]

The cases cited by petitioners from the Fifth and Third Circuits are not in conflict with the Seventh or Eleventh Circuit cases, or the instant cases. In Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992) and Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989), the Fifth Circuit upheld jury verdicts for employees after examining the evidence and noting that the employers did not produce any documentation to support their stated reasons for the adverse employment action. The Third Circuit in Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258 (3rd Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989), reviewed the evidence and found sufficient evidence to support the jury's verdict for the plaintiff. In these cases, as in Futrell, the courts reviewed the evidence before determining its sufficiency to support a verdict of discrimination.[4]

The Court should not grant certiorari without an actual conflict in the circuits. Further, even if the few cases cited by petitioners were viewed as conflicting, this does not represent a fully developed legal issue for the Court to consider.

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[3]Of the three cases cited by petitioners to argue that a case must be submitted to a jury if a witness has an interest in the suit, two pre-date Chesapeake. See Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899); Ætna Life Ins. Co. v. Ward, 140 U.S. 76 (1891). The third, Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620 (1944), dealt with credibility determinations at the summary judgment stage.

[4] The last case cited by petitioners, Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994), also is inapposite. The court stated that a plaintiff must produce evidence casting substantial doubt on a fair number, not all, of the legitimate, non-discriminatory reasons proffered by the employer, to avoid summary judgment. Fuentes, 32 F.3d at 764 n. 7.

Additionally, petitioners grossly mischaracterize the Tenth Circuit as holding that a jury may not disbelieve the testimony of an employer's witness and is bound to accept an employer's proffered legitimate, nondiscriminatory reason unless there is direct evidence to the contrary. Nowhere in its opinions in these cases did the Tenth Circuit explicitly or implicitly make such a statement or finding. Instead, after a careful and thorough review of the record, the Tenth Circuit determined that even in the light most favorable to them, the petitioners had failed to produce evidence sufficient to carry their burden of proving intentional age discrimination. Doan v. Seagate Technology, Inc., 82 F.3d 974, 979 (10th Cir. 1996); Furr v. Seagate Technology, Inc., 82 F.3d 980, 988 (10th Cir. 1996).[5]

Although mere error is not a compelling reason to grant certiorari, petitioners' argument that the decision below was incorrect because the Tenth Circuit misinterpreted the evidence concerning salary forecast documents must be addressed.[6] Respondent used salary forecasts solely for the purpose of forecasting employee raises for the next fiscal year. (Furr, R. Vol. II 109-110, 171; Vol. III 560-561; Vol. IV 622, 634, 679, 758, 770; Doan, R. Vol. 345, 398-399.) At trial, petitioners argued that the salary forecasts were based on the same criteria used in the RIF, and contended that the employees listed last on the forecasts should have been laid off first. The Tenth Circuit recognized that petitioners' argument was not supported by the

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[5]The other two Tenth Circuit cases cited by petitioners, Prochuska v. Marcoux, 632 F.2d 848 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981), and Madison v. Desert Livestock Co., 574 F.2d 1027 (10th Cir. 1978), do not stand for the proposition urged by petitioners. In these cases, the Tenth Circuit merely stated that credibility determinations are not proper at the summary judgment stage.

[6]This was the only evidence the petitioners argued the Tenth Circuit misinterpreted.

evidence and was, therefore, insufficient as a matter of law to establish age discrimination.

In Furr, the Tenth Circuit noted that petitioners' own witness admitted the salary forecasts failed to take into account the possibility of position elimination, which was Seagate's first RIF criteria. (Furr, R. Vol. II 120). The Tenth Circuit also recognized that petitioners relied on salary forecasts which combined several departments, ignoring the uncontroverted evidence that managers were only allowed to select employees from their own departments. (Furr, R. Vol. II 312-13; Vol. III 53-455; Vol. IV 690; Vol. V 971, 974, 980, 982-1034.) The salary forecasts for each petitioner's individual department showed that petitioners were ranked lowest of those similarly situated in their departments. (Furr R. Vol. II 209-210; Vol. III 447 Vol. V 971). According to their own theory, petitioners should have been selected for the RIF if the salary forecasts had been used.

Finally, petitioners argued that on the salary forecasts five managers[7] were "ranked" in order of age. Petitioners contended that this showed discrimination because the managers who selected petitioners would have followed the lead of their manager. Such rank speculation, however, is insufficient to support a jury verdict. As the Tenth Circuit noted, age was not listed on the ranking and petitioners produced no evidence that age was a factor in the rankings. (Furr, R. Vol. IV; 634-635; Vol. V 971, 924, 1037). Further, petitioners' argument was not even correct. (Furr, R. Vol. IV 682-684, 742-743.) The Tenth Circuit also noted petitioners' own testimony that they did not believe their managers, who undisputedly selected them for layoff, would intentionally

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[7]None of these managers were laid off.

discriminate against them on the basis of age. (Furr, R. Vol. II 194, 202-204, 256-257, 337; Vol. III 354, 438-439).

In Doan, the petitioner alleged that his manager "deviated" from the salary forecast documents in order to select him for the RIF because he was not the last person listed on the salary forecast for the year of the RIF. As the Tenth Circuit noted, however, this did not constitute probative evidence of discrimination because the undisputed documentary evidence showed that it had been Doan's supervisor's regular practice for a number of years to list new employees below other employees on the salary forecasts. (Doan, R. Vol. III 347, 349, 352, 557-558). Thus, a reasonable jury could not have concluded that listing new employees below Doan on the salary forecasts in the year of the RIF was evidence of age discrimination.

As stated in Chesapeake, the Tenth Circuit was not required to overlook uncontradicted evidence supporting the respondent's witnesses' testimony simply because a jury generally determines the credibility of the witnesses. The testimony of the employer's witnesses on the salary forecasts was uncontradicted by any other witness, supported by petitioners' witness and consistent with the documentary evidence. The Tenth Circuit did not deny the jury the right to disbelieve the employer's witnesses, as petitioners argue. Rather, the Tenth Circuit fulfilled its duty under Fed.R.Civ.P. 50, and concluded that the evidence was insufficient as a matter of law to prove intentional age discrimination.

Petitioners' real argument is that an appellate court should be absolutely precluded from granting JMOL in employment discrimination cases. The absurdity of petitioners' underlying argument is exposed when the basic rationale for the indirect method of proof in discrimination cases is considered:

> The standards for granting summary judgment, a directed verdict, and a judgment notwithstanding the verdict ("JNOV") are essentially the same; all of these motions "call upon the court to make basically the same determination -- that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law." Wright & Miller *Federal Practice and Procedure* Section 2713.1 at 613, Section 2537 at 599 (1983). If we could never reverse a jury verdict for the plaintiff in an "unworthy of credence" claim on the ground of insufficiency of the evidence, then a district court could never grant summary judgment or a directed verdict for the employer; in every claim, the jury would have to be given its opportunity simply to disbelieve the employer. This result does not follow from *Burdine* and would overrule the basic requirement that a jury verdict be supported by "substantial" evidence. The purpose of *Burdine* was not to allow plaintiffs to go to the jury without presenting any evidence at all; its purpose was to allow plaintiffs to prove discrimination without presenting any evidence of *discrimination*, and solely with evidence of pretext. Furthermore, such a holding would be perverse. Cases based on indirect and circumstantial evidence of pretext should not be less subject to dismissal for insufficiency than cases based on evidence which is *more* probative of discrimination.

Perfetti v. First National Bank of Chicago, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 2995 (1992); see also

Newell Companies, Inc. V. Kenney Mfg. Co., 864 F.2d 757, 763 (Fed. Cir. 1988) ("a party has a right to a *jury trial* in an action at law, not a right to a *jury verdict* [; a] jury verdict need not be obtained and may be set aside under the common law principles incorporated into the Constitution where there is no fact issue for the jury to decide."), *cert. denied*, 493 U.S. 814 (1989); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 659 (1935) (whether evidence is sufficient to support a verdict for a plaintiff is a question of law to be resolved by the court).

Petitioners' arguments in their first proposition do not provide a basis for granting certiorari.

2. In their second proposition, petitioners claim that a conflict exists among the circuits as to the *prima facie* case in RIF cases. Petitioners fail to explain the perceived conflict. It is this: In a RIF case, whether a plaintiff is required to come forward with additional evidence that his protected characteristic was a factor in his termination in order to establish a *prima facie* case. The Eighth Circuit follows this approach. See Bialas v. Greyhound Lines, Inc., 59 F.3d 759 (8th Cir. 1995). Petitioners contend that this formulation of the plaintiff's prima facie case conflicts with other circuits. In the cases cited by petitioners, Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) and Marzano v. Computer Science Corp. Inc., 91 F.3d 497 (3rd Cir. 1996), it was held that at the *prima facie* stage a plaintiff is not required to produce some additional evidence that he was singled out for discharge because of his protected status. These cases found that the fourth element of the *prima facie* case was satisfied by showing that persons not in the protected class were retained (i.e., treated more favorably). Oxman, 846 F.2d at 455; Marzano, 91 F.3d at 507.

In the instant cases, respondent admitted that petitioners met their initial burden of proving a *prima facie* case. Furr, 82 F.3d at 985; Doan, 82 F.3d at 976. Consequently, whether or not a conflict exists as to the proper formulation of a plaintiff's *prima facie* case is fundamentally irrelevant to this case. These cases were decided on "'the single overarching issue whether [petitioners] adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against [them] on the basis of age.'" Furr 82 F.3d at 985; Doan, 83 F.3d at 977.

Detracting even more from petitioners' argument is the fact that the Tenth Circuit follows the Third and Seventh Circuits approach -- the one petitioners argue is correct. To establish a *prima facie* case in the context of a RIF, the Tenth Circuit merely requires a plaintiff to show that persons not in the protected class were treated more favorably. See Rea v. Martin-Marietta Corp., 29 F.3d 1450, 1454 (10th Cir. 1994); Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994). Consequently, petitioners' contention that the Tenth Circuit followed the "additional evidence approach" is without merit. See Petition at 15. Moreover, the portion of the Tenth Circuit's opinion in Furr to which petitioners cite in support of this argument deals with petitioners' ultimate burden of proof, not whether petitioners established a *prima facie* case.[8]

It also should be noted that petitioners' argument misconstrues the employers' burden, which is one of production only. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747

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[8]Petitioners' quote on page 15 of their petition also is only a partial quote from Furr. The remainder of the sentence states that petitioners did not show that the departments were selected because of age. Petitioners do not cite any portion of Doan in this proposition.

(1993). Petitioners retain the ultimate burden of proof at all times. Id. Here, contrary to petitioners' contention, respondent fully satisfied its burden of production as to its legitimate nondiscriminatory reasons for terminating petitioners' employment. Seagate presented evidence that petitioners were laid off because of a company-wide RIF, and that they were selected for layoff by their managers using the RIF criteria.

Petitioners' argument concerning the *prima facie* showing required in RIF cases is irrelevant to anything in the instant cases. To the extent that a conflict exists concerning the proper formation of a *prima facie* case, the Court, and all litigants, would be better served by the Court waiting for a case that actually involves such a conflict. Only then will the legal issues be properly developed with a full evidentiary background for the Court's consideration. Accordingly, certiorari should be denied.

3. In proposition three, petitioners query whether the standard for JMOL as set forth in Lavender v. Kern, 327 U.S. 645 (1946), a case under the Federal Employers' Liability Act ("FELA"), is limited to FELA and Jones Act cases or whether it applies more broadly. Petitioners, however, never raised this issue in the proceedings below. They cannot raise it for the first time to this Court. See Kosak v. United States, 465 U.S. 848, 865 n.3 (1984) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it.").

Indeed, in their answer briefs to the Tenth Circuit, petitioners set forth the following quote from EEOC v. Prudential Federal Sav. and Loan Ass'n, 763 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985), as embodying the applicable standard for JMOL:

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable interferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.,** 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.,** and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.,** 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

Doan Corrected Answer Brief at A-2; Furr Corrected Answer Brief at A-6. Petitioners cannot now argue that a purportedly more stringent JMOL standard should have been applied by the Tenth Circuit.

Assuming, *arguendo*, that petitioners can raise this issue, the question presented does not require the exercise of the Court's extraordinary and discretionary jurisdiction. In essence, petitioners are asking this Court for guidance in formulating the proper standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Such guidance has been given by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986):

The petitioners suggest, and we agree, that this standard [the standard for summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80, 88 L.Ed. 239, 64 S.Ct. 232 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53 (1949). As the Court long ago said in Improvement Co. v. Munson, 14 Wall 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that it there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence

> is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Footnotes omitted.)

See also Pleasants v. Fant, 22 Wall 116, 120-121, 22 L.Ed. 780 (1875); Coughran v. Bigelow, 164 U.S. 301, 307, 41 L.Ed. 442, 17 S.Ct. 117 (1896); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 (1933).

Anderson fully answers the question as to the standard to be applied in deciding motions for judgment as a matter of law. Petitioners make no showing as to why this Court should answer it again.

The JMOL standard set forth in Anderson is the standard the Tenth Circuit applied in the instant cases. Further, this is the same standard routinely applied by the circuit courts in employment discrimination cases. See Von Zuckerstein v. Argonne Nat'l Laboratory, 984 F.2d 1467, 1471 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 419 (1993); Thomure v. Phillips Furniture Co., 30 F.3d 1020, 1022 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1255 (1995); Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 175 (1993); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 (3rd Cir. 1995); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1350 (4th Cir. 1995); Molnar v. Ebasco Constructors, Inc., 986 F.2d

115, 117-118 (5th Cir. 1993); Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 716 (1st Cir. 1994); Ebrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1469 (11th Cir. 1994). Petitioners' contention that an allegedly more stringent JMOL standard should be applied in employment discrimination cases is clearly without any legal basis. Certiorari, therefore, should be denied.[9]

4. In proposition four, petitioners raise the issue whether, under the Seventh Amendment, a court of appeals is required to explain why it did not grant a new trial when it sets aside a jury's verdict due to insufficient evidence. The question raised by petitioners has already been answered by this Court. Certiorari, therefore, should be denied.

Under the very case relied upon by petitioners, Neely v. Eby Construction Co., 386 U.S. 317 (1967), it is clear that the Tenth Circuit was not required to explain the reasoning behind its denial of petitioners' motions for new trials. In Neely, the Court addressed whether an appellate court, after reversing the trial court's denial of a defendant's motion for judgment notwithstanding the verdict, may itself direct the trial court to dismiss the action due to insufficient evidence. The Court held that such a dismissal was within the appellate court's power and did not violate the Seventh Amendment. Id. Petitioners' statement that it "is not completely clear" that JMOL based on insufficiency of the evidence is permissible under the Seventh

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[9]Petitioners' contention that under any standard JMOL was improper is without merit, as fully explained in the Tenth Circuit's opinions. In any event, misapplication of a properly stated rule of law is not a proper basis for certorari. Such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

Amendment is incredible as this was the unmistakable holding of Neely.

Neely does not set forth any *per se* requirement that an appellate court explain its rationale for not granting a new trial when JMOL is granted on appeal, nor is this the "logical extension" of Neely as petitioners contend. If anything, Neely supports the proposition that an appellate court is *not* required to even expressly deal with the new trial issue let alone explain its basis for not granting a new trial. As the Neely Court stated: "But we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question." Id. at 330.

Petitioners are, in essence, asking this Court to assume that the Tenth Circuit ignored its duty to consider their request for a new trial. As stated in Neely, this Court will not make such an assumption. Further, such an assumption is disproved by the record below. The Tenth Circuit, in its Order filed August 12, 1996, expressly denied petitioners' motions for new trials.[10]

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) does not support petitioners' contention that the Tenth Circuit was

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[10]Petitioners' motions for new trials were filed after the Tenth Circuit issued its opinions granting respondent judgment as a matter of law. The issue of a new trial in the event their evidence was found to be insufficient to support their verdicts was not raised in petitioners' answer briefs. Nowhere in their new trial motions did petitioners contend that the Tenth Circuit was required to explain its reason for denying them a new trial. See *Doan Petition for Rehearing With Suggestion of Consideration In Banc and Alternative Rule 50(d) Motion for New Trial, A-10-A-12; Furr Petition for Rehearing With Suggestion of Consideration In Banc and Alternative Rule 50(d) Motion for New Trial, A-14-A-16.* Petitioners, therefore, cannot raise this issue for the first time in their petition. See Kosak, 465 U.S. at 865 n. 3.

required to explain why their requests for a new trial were denied. Gulf does not set forth requirements applicable to orders addressing a new trial after the grant of appellate JMOL. Rather, Gulf dealt with a district court order issued under Rule 23 of the Federal Rules of Civil Procedure. In Gulf, this Court granted a writ of certiorari to determine the scope of a district court's authority to limit communications from named plaintiffs and their counsel to prospective class members during the pendency of a class action lawsuit. Id. at 91. It was in this context that the Court set forth guidelines for orders dealing with communications in class action lawsuits. Gulf, therefore, has no application to the instant case. Petitioners' request for certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 1996

Appendix A - Relevant Portions of the Corrected Answer Brief Filed in the Tenth Circuit by Petitioner Doan

Appeal No. 95-6180
(From West. Dist. Okla. CIV-9-1210-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK L. DOAN,

Plaintiff/Appellee,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' CORRECTED ANSWER BRIEF

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November 8, 1995

Oral Argument Not Requested

* * *

3. - JMOL WAS PROPERLY DENIED

Assuming this issue can even be reached, Mr. Doan will address the standard for JMOL, the effect of evidence of pretext and the sufficiency of the evidence.

A. - The Standard For Judgment As A Matter of Law

The standard for judgment as a matter of law (JMOL) is set out in **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985) (JNOV):

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.**, 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.**, and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.**, 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

In the context of an employment discrimination case, evidence of pretext precludes reversal of a jury verdict. **Binder v. Long Island Lighting Co.**, 57 F.3d 193, 200 (2d Cir. 1995) (reversing JMOL because "a rational trier could easily have disbelieved [employer's] principal proffered justification".). Also see **Gaworski v. ITT Commercial Finance Corp.**, 17 F.3d 1104, 1109 (8th Cir. 1994):

> "[I]f (1) the elements of a prima facie case are present, and (2) there exists a sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding. . ."

In this case, the ultimate issue is the existence of an intention to discriminate. It must be remembered, however, that Mr. Doan brought two related but different claims. Under the ADEA "a basic finding of liability under the act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct." **Cooper v. Asplundh Tree Expert Co.**, 836 F.2d 1544, 1551 (10th Cir. 1988). In contrast, the Oklahoma public policy claim requires only proof that age was one 'significant factor'. **Tate v. Browning-Ferris, Inc.**, 833 P.2d 1218, 1230 n. 69 (Okla. 1992). "Under Oklahoma law, the 'determining factor' test is a more stringent test than the 'significant factor' test". **Bentley v. Cleveland County Board of County Com'rs**, 41 F.3d 600, 606 (10th Cir. 1994).

Mr. Doan will show that his evidence is sufficient under either standard.

* * *

Appendix B - Relevant Portions of the Corrected Answer Brief Filed in the Tenth Circuit by Petitioners Furr, Woosley and Ozinga

Appeal No. 95-6181
(From West. Dist. Okla. CIV-93-939-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT S. FURR, LESLIE WOOSLEY, AND BERNARD OZINGA,

Plaintiffs/Appellees,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' CORRECTED ANSWER BRIEF

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November 1, 1995

Oral Argument Not Requested

* * *

3. - JMOL WAS PROPERLY DENIED

Assuming this issue can even be reached, Appellees will address the standard for JMOL, the effect of evidence of pretext and the sufficiency of the evidence.

a. - The Standard For Judgment As A Matter Of Law

The standard for judgment as a matter of law (JMOL) is set out in **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985) (JNOV):

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.,** 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.**, and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.,** 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

In the context of an employment discrimination case, evidence of pretext precludes setting aside a jury's verdict. **Binder v. Long Island Lighting Co.**, 57 F.3d 193, 200 (2nd Cir. 1995) (reversing JMOL because "a rational trier could easily have disbelieved [employer's] principal proffered justification".). Also see **Gaworski v. ITT Commercial Finance Corp.**, 17 F.3d 1104, 1109 (8th Cir. 1994):

> "[I]f (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding. . ."

Furthermore, "statistical evidence [which shows] a significant association between age and discharge" coupled with other evidence is sufficient to prove age discrimination. **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985).

In this case, Appellees brought two related but different claims. Under the ADEA "a basic finding of liability under the act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct." **Cooper v. Asplundh Tree Expert Co.**, 836 F.2d 1544, 1547 (10th Cir. 1988). In contract, the Oklahoma public policy claim requires only proof that age was one 'significant factor'. **Tate v. Browning-Ferris, Inc.**, 833 P.2d 1218, 1230 n. 69 (Okla. 1992). "Under Oklahoma law, the 'determining factor' test is a more stringent test than the 'significant factor' test". **Bentley**

v. Cleveland County Board of County Com'rs, 41 F.3d 600, 606 (10th Cir. 1994).

Appellees will show that their evidence is sufficient under either standard.

* * *

Appendix C - Relevant Portions of the Alternative Rule 50(d) Motion for New Trial Filed in the Tenth Circuit by Petitioner Doan

Appeal No. 95-6180
(From West. Dist. Okla. CIV-93-1210-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK L. DOAN,

Plaintiff/Appellee,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION OF CONSIDERATION IN BANC AND ALTERNATIVE RULE 50(d) MOTION FOR NEW TRIAL

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May 31, 1996

* * *

ALTERNATIVE RULE 50(d) MOTION TO MODIFY THE MANDATE TO ALLOW CONSIDERATION OF NEW TRIAL IN LIEU OF JMOL

Under Rule 50(d), Fed.R.Civ.P., if JMOL is granted on appeal, the appellee may move for a new trial in lieu of judgment. Appellee may "seek rehearing from the court of appeals after his judgment has been reversed" to secure this relief. **Neely v. Eby Construction Co.**, 386 U.S. 317, 329, 18 L.Ed.2d 75, 84 (1967). **Neely** warned that "obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial which should more appropriately be addressed to the trial court." **Neely**, 386 U.S. at 325-26, 18 L.Ed.2d at 82-83.

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. * * * A plaintiff. . .may ask the trial judge [or appellate court] to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. . ." **Id.** 386 U.S. at 327-28, 18 L.Ed.2d at 83-84.

There are strong reasons why this request should be decided by the trial judge:

> "A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record. Thus. . .

> trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues 'in a perspective peculiarly available to him alone.'" Citations omitted.

Neely, 386 U.S. at 337, 18 L.Ed.2d at 89 (Black, J., dissenting). Cf., **Swearngin v. Sears, Roebuck & Co.**, 376 F.2d 637, 643 (10th Cir. 1967).

A new trial in lieu of JMOL is virtually mandatory when "the trial court itself caused the insufficiency in plaintiff-appellee's case". **Id.**, 386 U.S. at 327. Here, the trial court excluded Doan's statistical evidence and expert testimony, but because Doan prevailed it was not necessary to either claim error or seek a nonsuit to reformulate the evidence. Further, certain of the issues deemed critical on appeal (lack of a college degree, similarity in job duties) were not raised at trial and Doan has never been allowed an adequate opportunity to offer proof of pretext on these issues. Evidence is available as to performance appraisals, job duties, seniority or time in the group for other co-workers which would fill this Court's perceived gap in the evidence. Also evidence exists as to the exclusion of groups of younger employees from the RIF which, on a cumulative basis, adds to the conclusion that age was a determinative factor in Doan's termination.

As to the state law verdict, the Opinion, pg 2 fn 1, misunderstands Doan's position. Doan conceded that **List v. Anchor Paint Mfg Co.**, 910 P.2d 1011 (Okla. 1996) disallowed a **Burk** tort, but he also argued that the matter was not preserved for appeal. Since the issue was never briefed -- even on appeal -- Plaintiff has not been given the chance to urge

the existence of alternative state-law remedies arising from the same core facts.

CONCLUSION

Congress authorized jury trials in ADEA cases because a "jury may be more neutral" and "more likely to be open to the issues raised by the plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As suggested by the legislative history, this Court should defer to the collective wisdom of the jury who first hand observed the demeanor and manner of the witnesses. At the least, judgment should not be entered and a new trial should be allowed where Plaintiff may address the perceived gaps in this case.

* * *

Appendix D - Relevant Portions of the Alternative Rule 50(d) Motion for New Trial Filed in the Tenth Circuit by Petitioners Furr, Woosley and Ozinga

Appeal No. 95-6181
(From West. Dist. Okla. CIV-93-939-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT S. FURR, LESLIE WOOSLEY, AND BERNARD OZINGA,

Plaintiffs/Appellees,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION OF CONSIDERATION IN BANC AND ALTERNATIVE RULE 50(d) MOTION FOR NEW TRIAL

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May 31, 1996

* * *

ALTERNATIVE RULE 50(d) MOTION TO MODIFY THE MANDATE TO ALLOW CONSIDERATION OF NEW TRIAL IN LIEU OF JMOL

Under Rule 50(d), Fed.R.Civ.P., if JMOL is granted on appeal, the appellee may move for a new trial in lieu of judgment. Appellee may "seek rehearing from the court of appeals after his judgment has been reversed" to secure this relief. **Neely v. Eby Construction Co.**, 386 U.S. 317, 329, 18 L.Ed.2d 75, 84 (1967). **Neely** warned that "obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial which should more appropriately be addressed to the trial court." **Neely**, 386 U.S. at 325-26, 18 L.Ed.2d at 82-83.

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. * * * A plaintiff. . .may ask the trial judge [or appellate court] to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. . ." **Id.** 386 U.S. at 327-28, 18 L.Ed.2d at 83-84.

There are strong reasons why this request should be decided by the trial judge:

> "A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record. Thus. . .

> trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues 'in a perspective peculiarly available to him alone.'" Citations omitted.

Neely, 386 U.S. at 337, 18 L.Ed.2d at 89 (Black, J., dissenting). Cf., **Swearngin v. Sears, Roebuck & Co.**, 376 F.2d 637, 643 (10th Cir. 1967).

A new trial in lieu of JMOL is virtually mandatory when "the trial court itself caused the insufficiency in plaintiff-appellee's case". **Id.**, 386 U.S. at 327. Plaintiffs relied on **Anderson v. City of Albuquerque**, 609 F.2d 796 (10th Cir. 1992) and the trial court's rulings in formulating their statistics. Similarly, Plaintiffs relied on **Bell v. AT&T**, 946 F.2d 1507 (10th Cir. 1991) in believing it was Seagate's burden to explain why groups of younger employees were excluded from the RIF.

It would be manifestly unfair to deny Appellees, who received a favorable jury verdict, the opportunity to fill in gaps in their evidence. Had the trial court, for instance, excluded the statistics which Plaintiffs offered, the trial court could also have allowed Plaintiffs an opportunity to reformulate those statistics. Had Defendant offered explanations for its exclusion of younger groups from the RIF as, for example, on difference in functions or assignments of those groups, Plaintiffs could have -- even during the prior trial -- presented additional evidence challenging such explanations as pretextual.

As to the state law verdict, the Opinion, pg 2 fn 1, misunderstands Plaintiffs' position. Plaintiffs conceded that **List v. Anchor Paint Mfg Co.**, 910 P.2d 1011 (Okla. 1996) disallowed a **Burk** tort, but they also argued that the matter was

not preserved for appeal. Since the issue was never briefed -- even on appeal -- Plaintiffs have not been given the chance to urge the existence of alternative state-law remedies arising from the same facts.

CONCLUSION

Congress authorized jury trials in ADEA cases because a "jury may be more neutral" and "more likely to be open to the issues raised by the plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As suggested by the legislative history, this Court should defer to the jury who observed the demeanor and manner of the witnesses. At the least, a nonsuit should be allowed so that Plaintiffs may address the perceived gaps in their case.

* * *

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-625

In The

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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STATEMENT OF FACTS

Contrary to Respondent's suggestion, Petitioners presented substantial evidence of discrimination and the Tenth Circuit's opinion can only be understood as a complete reweighing of relevant evidence.

Respondent claimed Mr. Doan was terminated because he was the lowest performer in his group, but the salary planning rankings created just weeks prior to the RIF showed Doan performing at a higher level than five much younger employees who were retained. Respondent had earlier sworn that no "different criteria [are] used for the salary planning purposes as compared to a ranking for, say, reduction in force purposes". App. Vol. II, pp. 114-15, 119-20, 122-23; Vol. III, p. 287. It was admitted that the ranking was in order of performance, App. Vol. II, pp. 61, 63, and that Doan's supervisor had the opportunity to observe the new employees and rank them higher if that had been warranted. App. Vol. II, p. 64. Though Respondent claimed Doan had serious performance problems, the written performance appraisals showed Doan had consistently improved in all areas and, just weeks prior to the RIF, Doan was rated satisfactory or better in every aspect of his performance. App. Vol. III, pp. 362-68; Def's Exh. 1-3, pp. 536-550. When Respondent's representative was asked if there were any documents to show Doan performing at a lower level than any younger, retained employees, he answered: "No, there's not" and "Only in my mind." App. Vol. II, pp. 69-70.

Further, Doan's immediate supervisor — the person who also made the RIF selections — testified that he was unaware of the age difference between Doan (age 59) and the five other lower ranked employees (aged 27 to 36) who he also supervised. App. Vol. III, p. 386, lines 14-17; p. 514, Plf's Exh. 4. This and other inconsistencies fully justified the jury's disbelief of Respondent's testimony.

As to Petitioners Furr, Woosley and Ozinga, Respondent admitted that it used undocumented and unrecorded criteria to select persons for termination, App. Vol. III, pp. 538-539. Petitioners refuted the oral reasons by pointing to documents created weeks before the RIF showing that younger persons were retained who were ranked, under the RIF criteria, as less valuable. App. Vol. II, pp. 81-85; Vol. IV, pp. 624, 638, 641, 788. Contrary to the statement in the circuit's opinion, the jury heard evidence that "elimination of positions" and overall value was encompassed in these rankings. App. Vol. II, pp. 81, 84; App. Vol. IV, pp. 624, 638, 641 & 788.

Petitioners also showed that their three managers each had ranked his subordinates in order of age always favoring youth: Sedlacek ranked his three youngest managers ranked highest; the two oldest ranked lowest. App. Vol. IV, pp. 742-43. Diffin ranked his five managers ranked in exact order of age; youngest ranked highest and oldest lowest. App. Vol. IV, pp. 620-21, 624; App. Vol. V 971, Plfs' Trial Exh. 21. West ranked his two directors and three managers in exact age order; youngest ranked highest and oldest lowest. App. Vol. IV, pp. 682-84.

Petitioners also showed that although the reduction was supposed to be 15% across-the-board, App. Vol. IV, p. 717, eight groups — approximately 1/3 of the employees in Petitioners' department — lost no one in the RIF. These groups were comprised predominately of younger employees. Three of the groups had no employees under age 40 and there were 15 new hires in those groups. App. Vol. IV, p. 614, line 21 to p. 615, line 12. No document existed to show why the groups of young employees were excluded from the RIF. App. Vol. IV, p. 744, lines 6-17. Additionally young, low performing employees were allowed to transfer into new positions to protect them from termination. App. Vol. IV, p. 746.

This is, of course, only a sample of the evidence Petitioners presented which amply supported the jury's verdict.

FURTHER REASONS FOR GRANTING THE WRIT

Four questions are presented warranting the review of this Court:

1. Whether a jury's disbelief of an employer's uncorroborated explanation for its employment action is sufficient to sustain the jury's finding of discrimination.

Respondent claims there is no clear conflict between the circuits on this issue, but a circuit need not expressly acknowledge a conflict for review to be proper. The question is whether the application of one circuit's legal standard would result in a different outcome than if the standard of another circuit was applied.

Respondent's proffered explanation for the termination of Petitioners was purely oral. Had the principle utilized by the Fifth Circuit been applied here, the jury verdict would have been affirmed because where "there is no supporting documentation, a jury can reasonably infer pretext". *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir.1992).

When the effect of applying differing legal standards is to make the outcome of a case dependent on which circuit hears the matter, there is a conflict of sufficient importance to warrant review. *See, e.g., United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) (decision reviewed "appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 733, 734 (1985) (decisions "appeared to conflict in principle"), and *Barrett v. United States*, 423 U.S. 212, 215

(1976) (decisions "appeared to have overtones of conflict" between circuits).

Respondent's argument that there is no conflict also misses the mark in failing to understand the issue. The legal principle is this: When an employer's explanation is purely oral, rejection of that explanation is enough to sustain a plaintiff's verdict.

Of course there are situations where testimony goes to verifiable facts such that the failure to refute the testimony amounts to a concession of the facts. Here, however, the testimony goes to subjective state of mind, a matter not independently verifiable absent objective records or documents which this employer did not produce. Implicit in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3, 717 (1983) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1973) is that it is the jury's function — not that of the court — to make this decision.

Review is proper to ensure conformance with *Aikens* and *Burdine* in that the circuit holding "seem[s] to be out of line with the authorities", *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959) and "appear[s] to be in conflict with [this Court's] precedents". *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

Respondent's authorities do not diminish the importance of certiorari in this case and, in fact, highlight the error of the Tenth Circuit's decision. For instance in *United States v. Generes*, 405 U.S. 93, 106-107 (1972) this Court granted judgment on the basis that the taxpayer's self-serving testimony as to his motive which was contradicted by other evidence was insufficient to create a triable issue. Holding that self-serving and inconsistent testimony need not be credited is the polar opposite of the Tenth Circuit's characterization of such testimony as "uncontroverted".

2. Whether the *McDonnell Douglas* indirect method of proof applies in a lay-off setting to require the employer to explain why certain groups of employees are included in the reduction while others are excluded.

Respondent concedes there is a real and substantial split between the circuits as to how the *McDonnell Douglas* indirect method of proof applies in a RIF. Review is proper because "this conflict involves an important question of statutory construction", *Shapiro v. United States*, 381 U.S. 311, 314 (1965), and there is "the need for a uniform rule on the point". *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

Respondent argues that because it conceded a *prima facie* case Petitioners could not have been injured by application of the wrong standard. This concession did not cure the error of the Tenth Circuit in *applying* the wrong analysis of who bears the burden of production.

As pointed out in their initial petition, knowing which factual elements make up the *prima facie* case is critical to a correct decision. Absent a sufficient explanation by the employer, a jury which "finds that the prima facie case is supported by a preponderance of the evidence . . . *must* . . . render a verdict for the plaintiff." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 n. 3 (1993) (emphasis by the Court). The facts making up the prima facie case coupled with "disbelief of the reasons put forward by the defendant [may] suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

The Tenth Circuit required Petitioners to eliminate all possible legitimate reasons for the exclusion of young employees from the RIF even though the employer had not itself articulated an explanation. *Furr*, 82 F.3d at 987. Indeed, the Circuit speculated that "the fact that some departments were unaffected

may be the natural consequence of the greater perceived importance of certain departments." *Id.*, emphasis supplied.

This approach is contrary to the standard used in the Third and Seventh Circuits which requires the employer to explain why certain employees are made subject to a RIF while other employees are not. "[A]n employer that releases a protected employee while [retaining] younger employees [must] explain its actions without forcing the protected employee to uncover the elusive 'smoking gun.' " *Oxman v. WLS-TV*, 846 F.2d 448, 455-56 (7th Cir.1988). *Accord Marzano v. Computer Science Corp.*, 91 F.3d 497, 508-511 (3d Cir.1996). Had the Seventh Circuit approach been followed, the outcome would have been different because the Respondent would not have met its burden of refuting the *prima facie* case.

Respondent argues that the Tenth Circuit already follows the rules utilized by the Third and Seventh Circuits, but ignores the fact that *Furr* stands in direct conflict with prior Tenth Circuit precedent. In *Bell v. AT&T*, 946 F.2d 1507, 1511 (10th Cir.1991) the circuit held that in cases "involving a reduction-in-force, the employer must assert a legitimate justification for leaving certain employees out of the group susceptible to termination while including others." *Bell* also held that it was reversible error for a court to supply its own reason for an employer's action when the employer itself had failed to offer a reason. *Id.*, 946 F.2d at 1514. *Furr* thus created an intracircuit conflict which further justifies certiorari. *See Scarborough v. United States*, 431 U.S. 563, 567 n. 4 (1977); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939), and *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

3. Whether jury verdicts in employment discrimination cases are entitled to the same deference afforded jury verdicts in FELA/ Jones Act cases.

Respondent argues that this matter was not preserved because *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) was not cited to the circuit. At the trial level JMOL was denied, and on appeal Petitioners showed that the jury's verdict was amply supported such that under any standard JMOL was inappropriate.

Regardless of the standard used, the evidence was sufficient to sustain the jury's verdict. The importance of preserving the jury's function in ADEA cases is sufficient to warrant summary reversal by this Court. *See Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (review granted "because of the importance of preserving for litigants in FELA cases their right to a jury trial."). Justice Douglas noted that prior decisions of the Supreme Court and appellate courts had frustrated the congressional mandate that juries should determine liability in FELA cases. That same congressional mandate exists in ADEA cases where jury trials were provided because a "jury may be more neutral" and "more likely to be open to issues raised by plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As in *Wilkerson*, "a decision not to correct [the decision] [i]s to let the administration of the law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation." *Id.*, 336 U.S. at 69 (Douglas, J., concurring). "The criterion governing the exercise of our discretion in granting or denying certiorari is . . . whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected". *Id.*, 336 U.S. at 70-71.

This presents an appropriate context for this Court to determine the correct JMOL standard. Petitioners' assertion that

JMOL was inappropriate requires determination of the correct standard. The failure to specify the *Lavender* (FELA) standard is not an absolute barrier to considering the issue. *Cf., Singleton v. Wulff*, 428 U.S. 106, 121 (1976) and *Hormel v. Helvering*, 312 U.S. 552, 557 (1940) (question may be reached when "injustice might otherwise result.").

Of course it was impossible to anticipate the need to raise the *Lavender* (FELA) JMOL standard because Petitioners could not anticipate that the Circuit would ignore its own precedent regarding the admissibility and weight to be accorded Petitioners' evidence.

Nor is Respondent correct in arguing that the applicable JMOL standard has been determined by this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) did not address the FELA and Jones Act decisions nor purport to overrule them. Thus, as noted in 9A Wright & Miller, *Federal Civil Procedure, Civil 2d*: § 2526, pg 282, two distinct JMOL standards currently exist and reconciliation "would be of helpful guidance to the lower federal courts."

4. Whether denial of a post-JMOL motion for new trial by an appellate court is such a drastic measure that respect for the jury's function under the Seventh Amendment requires that such action be summarily reversed absent a statement of the basis for that denial.

Respondent argues that this Court has already decided that a court of appeals need not set out the reasons for entering JMOL in lieu of remanding for a new trial citing to *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967). In *Neely*, 386 U.S. at 329-330, the plaintiff had never moved for a new trial in lieu of JMOL. Despite this failure, this Court held that "it would have been better had [the Court of Appeals'] opinion expressly dealt with the new trial question." *Id.*

Here, Petitioners expressly moved for new trial in their Petitions for Rehearing but the circuit without explanation denied such request. The question is whether, when presented with a specific request and specific factors justifying a new trial in lieu of JMOL, a court of appeals should be required to articulate the basis for its decision. Denying the request for an alternative new trial substantially impairs the right to trial by jury; a matter sufficiently important to warrant review by this Court. *Wilkerson, supra*, 336 U.S. at 55 (certiorari granted "because of the importance of preserving for litigants in FELA cases their right to a jury trial."). *Accord Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (diversity, negligence suit); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (diversity, insurance claim) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (non-jury trial of an "equity" issue in a civil antitrust case).

The ADEA shares with FELA the same congressional mandate that juries be allowed to decide the issues. Because JMOL subverts both the Seventh Amendment and the congressional mandate that ADEA issues are to be decided by a jury, entry of JMOL should be carefully circumscribed. This can only be accomplished by requiring courts to articulate the reasons why a new trial is not granted at least in cases where the plaintiff makes a timely Rule 50(d) motion.

CONCLUSION

Petitioners pray that this Court grant certiorari to the Tenth Circuit of the United States Court of Appeals.

Respectfully submitted,

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